TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1910.

No. [redacted] 56.

GERMAN ALLIANCE INSURANCE COMPANY, PLAINTIFF IN ERROR,

vs.

FOSTER K. HALE, JUNIOR.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ALABAMA.

FILED AUGUST 12, 1908.

(21,302)

(21,302)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 237.

GERMAN ALLIANCE INSURANCE COMPANY, PLAINTIFF IN ERROR,

vs.

FOSTER K. HALE, JUNIOR.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ALABAMA.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JANUARY 15, 1910.

1 *Caption.*

Circuit Court of the United States for the Southern District of Alabama, Fifth Judicial Circuit.

A transcript of the record and proceedings had in said court in common law case number 1289 wherein Foster K. Hale, Junior, is plaintiff, versus German Alliance Insurance Company, a corporation, is defendant.

Said case being removed by said German Alliance Insurance Company from the Circuit Court of Mobile County, Alabama, into the said Circuit Court of the United States for the Southern District of Alabama, and judgment rendered in favor of said plaintiff and wherein the defendant claims that a law of the State of Alabama is in contravention of the constitution of the United States and sues out a writ of error to the Supreme Court of the United States as follows:

Summons and Complaint.

In the Circuit Court of Mobile, Alabama.

FOSTER K. HALE, JR.,
vs.
GERMAN ALLIANCE INSURANCE COMPANY OF NEW YORK, a Corporation.

Plaintiff claims of the defendant Four Thousand dollars the value of a lot of square timber same being stacked on the banks of Burn's Mill Pond, near Bay Minette, Baldwin County, Alabama, which the defendant on the 23rd day of February, 1907, insured against loss or injury by fire for the term of one year which said square timber aforesaid was wholly destroyed by fire on or about the 30th, day of March, 1907, of which the defendant has had notice.

Second.

Plaintiff further claims one thousand dollars, for that said defendant belonged to and was a member of a Tariff Association in the City of New York the name of said Tariff Association being to the plaintiff unknown at the time of making of said contract or policy of insurance the subject matter of this suit.

2 Third.

And plaintiff further claims of the defendant One thousand dollars for that the defendant belonged to and was a member of a Tariff Association in the City of Mobile to-wit: "Southeastern Tariff Association", at the time of the making of said contract or policy of insurance the subject matter of this suit.

Fourth.

Plaintiff further claims of the defendant One Thousand Dollars, for that said defendant subsequent to the making of said contract or policy of insurance the subject matter of this suit, but before the trial of this cause belonged to and was a member of a Tariff Association in the City of New York the name of said Tariff Association being to the plaintiff unknown.

Fifth.

Plaintiff further claims of the defendant One Thousand Dollars for that said defendant subsequent to the making of said contract or policy of insurance the subject matter of this suit; but before the trial of this cause belonged to and was a member of a Tariff Association in the City of Mobile, to-wit: "Southeastern Tariff Association.

Sixth.

Plaintiff further claims of the defendant one thousand dollars, for that the said defendant at the time of making said contract or policy of insurance was connected with an association in the City of New York the name of which is to the plaintiff unknown; said association being engaged in regulating the rate or charge for fire insurance, risks:

Seventh.

Plaintiff claims of the defendant one thousand dollars, for that said defendant was at the time of the making of said contract or policy of insurance connected with an association in the City of Mobile, the name of which is to the plaintiff unknown; said association being engaged in regulating the rate or charge for fire insurance risks.

3 Eighth.

Plaintiff further claims of the defendant one Thousand dollars, for that said defendant was subsequent to the making of the said contract or policy of insurance the subject matter of this suit; but before the trial of this cause connected with an association in the City of New York the name of which is to the plaintiff unknown said association being engaged in regulating the rate or charge for fire insurance policies.

Ninth.

Plaintiff further claims of the defendant one Thousand dollars for that said defendant was subsequent to the making of the said contract or policy of insurance the subject matter of this suit; but before the trial of this cause connected with an Association in the City of Mobile, the name of which is to the plaintiff unknown; said association being engaged in regulating the rate or charge of fire insurance risks.

Tenth.

Plaintiff further claims of the defendant One Thousand dollars, for that said defendant had an agreement or understanding with Mr. T. L. Moore a person engaged in the insurance business as Agent about the particular rate of premium which should be charged or fixed for fire insurance risks; at the time of the making of the said contract or policy of insurance the subject matter of this suit.

Eleventh.

Plaintiff further claims of the defendant One Thousand dollars, for that said defendant at the time of the making of said contract or policy of insurance the subject matter of this suit, had an agreement or understanding by and with the American Central Insurance Company which said insurance Company is engaged in the insurance business about the particular rate or premium which should be charged or fixed for fire insurance risks.

Twelfth.

Plaintiff further claims of the defendant One Thousand dollars for that said defendant subsequent to the making of said contract or policy of insurance the subject matter of this suit; but be-
4 fore the trial of this cause had an agreement or understanding by and with the American Central Insurance Company, which said Insurance Company was engaged in the insurance business about the particular rate or premium which should be charged or fixed as to fire insurance risks.

F. K. HALE, Jr.,
Atty. Per Se.

Circuit Court, Spring Term, 1907.

THE STATE OF ALABAMA,
Mobile County:

To any Sheriff of the State of Alabama:

You are hereby commanded to summon German Alliance Insurance Company of New York a corporation to appear at the present term of the Circuit Court being held for said County on the first Monday in July 1907 at the place of holding the same then and there to answer the complaint of Foster K. Hale, Jr.,

Witness, S. H. Smith, Clerk of said Court this 4th day of June in the year of our Lord, one thousand nine hundred and seven. Issued the 4th day of June 1907.

Attest:

S. H. SMITH, *Clerk.*

Sheriff's Return.

Received the 4th day of June 1907 and on the 7th day of June 1907 I served a copy of within complaint and summons on German

Alliance Insurance Co. of New York by serving copy on T. I. Moore, Agent.

FRANK CAZALAS, SR., *Sheriff*,
By M. I. GOLDSMITH, *D. S.*

Filed July 12, 1907.

RICHARD JONES,
Clerk U. S. Circuit Court,
Southern District of Alabama.

Amendment to Complaint.

Circuit Court of the U. S. for So. Dist. of Alabama.
At Law. 1287.

FOSTER K. HALE, JR.,
vs.
GERMAN ALLIANCE INS. CO., a Corporation.

5 Comes the plaintiff in his own proper person and moves the Court to be allowed to amend his complaint in this cause as follows:—

By adding after the word (notice) on the last line of the first count of said complaint the following:—"together with the interest on said sum aforesaid."

F. K. HALE, JR.,
Attorney for Plaintiff.

Filed Oct. 4, 1907.
RICHD. JONES, *Clerk.*

Second Amendment to Complaint.

In the United States Circuit Court for the Southern District of Alabama.

FOSTER K. HALE, JUNIOR.
versus
GERMAN ALLIANCE INSURANCE COMPANY OF NEW YORK, a Corporation.

Comes the plaintiff and, by leave of the court, amends his complaint in the above entitled cause by adding thereto the following counts, viz:

"13. The plaintiff claims of the defendant the sum of five thousand dollars ($5,000.00) with interest, $4,000.00 whereof is the value of a lot of square timber which was stacked on the bank of Byrne's Mill Pond near Bay Minette, Baldwin County, Alabama, and which the defendant, on the 27th day of February, 1907, insured against loss or injury by fire for a term of one year, which said square timber aforesaid was wholly destroyed by fire on or about the

30th day of March, 1907, of which the defendant has had notice, and the plaintiff avers that at the time of making said contract or policy of insurance, the defendant was a member of the Southeastern Tariff Association.

14. The plaintiff claims of the defendant the further sum of five thousand dollars ($5,000.00) with interest thereon, $4,000.00 whereof is the value of a lot of square timber which was stacked on the bank of Byrne's Mill Pond near Bay Minette, Baldwin County, Alabama, which the defendant, on the 23rd day of February, 1907, insured against loss or injury by fire for a term of one year, which said square timber aforesaid was wholly destroyed by fire on
6 or about the 30th day of March, 1907, of which the defendant has had notice, and the plaintiff avers that at the time of making such contract or policy of insurance, the defendant had made an agreement or had an understanding with other persons, corporations or associations engaged in the business of insurance, but who are unknown to the plaintiff, regulating the rate or premium which should be charged or fixed for certain kinds or classes of insurance risks.

15. The plaintiff claims of the defendant the sum of five thousand dollars ($5,000.00) with interest, $4,000.00 whereof is the value of a lot of square timber which was stacked on the bank of Byrne's Mill Pond near Bay Minette, Baldwin County, Alabama, and which the defendant, on the 27th day of February, 1907, insured against loss or injury by fire for a term of one year, which said square timber aforesaid was wholly destroyed by fire on or about the 30th day of March, 1907, of which the defendant has had notice, and the plaintiff avers that the defendant, subsequent to the making of such contract or policy of insurance, but before the time of the trial of this cause belonged to the Southeastern Tariff Association.

16. The plaintiff claims of the defendant the sum of five thousand dollars ($5,000.00) with interest, $4,000.00 whereof is the value of a lot of square timber which was stacked on the bank of Byrne's Mill Pond near Bay Minette, Baldwin County, Alabama, and which the defendant, on the 27th day of February, 1907, insured against loss or injury by fire for a term of one year, which said square timber aforesaid was wholly destroyed by fire on or about the 30th day of March, 1907, of which the defendant has had notice; and the plaintiff avers that subsequent to the making of said contract or policy of insurance, but before the time of the trial of this cause, the defendant made an agreement or had an understanding with other persons, corporations or associations engaged in the business of insurance, but who are unknown to the plaintiff, under which the rate or premium which should be charged for certain kinds or classes of insurance risks was regulated.

17. The plaintiff claims of the defendant the sum of
7 five thousand dollars ($5,000.00) with interest, $4,000.00 whereof is the value of a lot of square timber which was stacked on the bank of Byrne's Mill Pond near Bay Minette, Baldwin County, Alabama, and which the defendant, on the 27th day of February, 1907, insured against loss or injury by fire for a term of one year, which said square timber aforesaid was wholly destroyed

by fire on or about the 30th day of March, 1907, of which the defendant has had notice, and the plaintiff avers that the policy of insurance sued upon was issued through one, Terry Moore, as Agent of the defendant, and that at the time of making said contract or policy of insurance, the defendant was connected with a tariff association, to-wit, the Southeastern Tariff Association in this, that it issued policies by or through its said agent, Terry Moore, who was a member of said Southeastern Tariff Association, and in so issuing said policies, premiums therefor were controlled by the rates fixed by said Association for such risks.

18. The plaintiff claims of the defendant the sum of five thousand dollars ($5,000.00) with interest, $4,000.00 whereof is the value of a lot of square timber which was stacked on the bank of Byrne's Mill Pond near Bay Minette, Baldwin County, Alabama, and which the defendant, on the 27th day of February, 1907, insured against loss or injury by fire for a term of one year, which said square timber aforesaid was wholly destroyed by fire on or about the 30th day of March, 1907, of which the defendant has had notice; and the plaintiff avers that after the contract or policy of insurance sued on was made, but before the trial of this cause, the defendant was connected with a tariff association in this, that it issued policies of insurance through one Terry Moore, as its agent, who was a member of the Southeastern Tariff Association, and in issuing such policies its premiums were controlled by the rates fixed by said Southeastern Tariff Association for such risks.

FOSTER K. HALE, JR.,
GREGORY L. &
H. T. SMITH,
Attorneys for the Plaintiff.

Filed Jan'y 2, 1908.
RICHARD JONES, *Clerk.*

8 *Demurrers to Complaint.*

In the United States Circuit Court.

FOSTER K. HALE
vs.
GERMAN ALLIANCE INSURANCE COMPANY OF NEW YORK, a Corporation.

Comes the defendant and demurs to the first count of the complaint.

1. Because it fails to show that the plaintiff had any interest in the property destroyed.

2. Because it fails to show what interest the plaintiff had in the property destroyed.

J. H. WEBB,
SHELTON SIMS,
Attorneys for Defendant.

Filed Dec. 2, 1907.
RICH'D JONES, *Clerk.*

Demurrers to Complaint.

In the United States Circuit Court.

FOSTER K. HALE
vs.
GERMAN ALLIANCE INSURANCE COMPANY OF NEW YORK, a Corporation.

Comes the defendant and demurs separately to each of the last eleven counts, towit, the second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh and twelfth counts, of complaint.

1. Because the same are frivolous, or insufficient.

2. Because the recovery sought under said counts is based upon section 2619 of the Code of Alabama and said section is in conflict with the constitution of the State of Alabama and is void.

3. Because it is in conflict with the constitution of the United States and is void.

4. Because they fail to state any cause of action.

5. Because said several counts are insufficient in not showing the existence of any contract of insurance.

J. H. WEBB,
SHELTON SIMS,
Attorneys for Defendant.

Filed Dec. 2, 1907.
RICHARD JONES, *Clerk.*

9 *Demurrers to Complaint.*

In the United States Circuit Court for the Southern District of Alabama.

FOSTER K. HALE, JR.,
vs.
THE GERMAN ALLIANCE INSURANCE CO.

Comes the defendant and demurs separately to each of the additional counts numbered 13, 14, 15, 16, 17 and 18, upon the grounds:

1st. That they state no cause of action.

2nd. They do not show that the plaintiff had any interest in the property alleged to have been destroyed.

3rd. They do not show what interest the plaintiff had in the property alleged to have been destroyed.

4th. Because they fail to show for what amount said property was insured.

5th. Because they show on their face that the amount claimed is greater than the value of the property destroyed with interest thereon.

6th. Because they seek to recover an amount twenty-five per cent greater than the value of the property under section 2619 of the

Code of Alabama, which said section is in violation of the Constitution of the State of Alabama and is void.

7th. Because they seek to recover an amount twenty-five per cent greater than the value of the property under section 2619 of the Code of Alabama, which said section is in violation of the Constitution of the United States and is void.

8th. Because they seek to recover an amount twenty-five per cent greater than the value of the property under section 2619 of the Code of Alabama, which said section is in violation of inalienable rights of a citizen and is void.

9th. Because said section is unreasonable and unjust and void.

10th. Because they fail to state the amount of the loss suffered by the plaintiff under said policy of insurance.

PILLANS, HANAW & PILLANS,
SHELTON SIMS,
J. H. WEBB,
Attorneys for Defendant.

Filed Jan'y 3, 1908.
RICHARD JONES, *Clerk.*

10 *Order on Demurrers.*

MONDAY, *January 13th, A. D.* 1908.

Present, Hon. Harry T. Toulmin, Judge, presiding.

At Law. No. 1289.

FOSTER K. HALE, JR.,
vs.
GERMAN ALLIANCE INSURANCE CO.

This cause coming on to be heard on the demurrers to the complaint, and being argued by the attorneys and duly considered by the Court, it is ordered by the Court that said demurrers be and the same are hereby overruled.

Third Amendment to Complaint.

In the United States Circuit Court for the Southern District of Alabama.

FOSTER K. HALE, JUNIOR,
vs.
GERMAN ALLIANCE INSURANCE COMPANY OF NEW YORK, a Corporation.

Comes the plaintiff and by leave of the Court amends counts 13, 14, 15, 16, 17 and 18 of his complaint in the above entitled cause by adding at the end of each of said counts the following additional averments:

"And plaintiff further avers that at the time of the making of said contract of insurance, and at all times thereafter up to and including the time of said loss, the property insured as aforesaid belonged to one W. M. Hallet; that at and during all of said times the plaintiff held a mortgage on all of said property to secure an indebtedness exceeding in amount $6,000.00 owing to him by the said Hallet, which mortgage was executed to the plaintiff by said Hallet; that no part of said indebtedness has ever been paid or otherwise discharged or released; and that while the said contract or policy of insurance was issued to the said Hallet, yet the existence of the said mortgage was made known to the defendant at the time of the issuance of the said policy, and the said policy was made to contain and does contain the following provision: "Loss, if any, payable to Foster
11 K. Hale, Jr., as his interest may appear at the time of fire."

F. K. HALE, JR.,
G. L. & H. T. SMITH, AND
STEVENS & LYONS,
Attorneys for Plaintiff.

Filed Jan'y 15, 1908, by leave of Court.
RICHARD JONES, *Clerk.*

Demurrers to Amended Complaint.

United States Circuit Court at Mobile.

FOSTER K. HALE, JR.,
vs.
GERMAN ALLIANCE INSURANCE COMPANY.

The defendant to the said plaintiff's said complaint as the same now on this day stands amended, demurs to each count of said amended complaint separately and severally, and as grounds of demurrer to each of said counts assigns the same grounds which were by it assigned as grounds of demurrer by it interposed and filed to the complaint as first amended.

PILLANS, HANAW & PILLANS,
SHELTON SIMS.
J. H. WEBB.

Filed Jan'y 16, 1908.
RICHARD JONES, *Clerk.*

Order on Demurrers to Complaint as Amended.

MONDAY, *January 20th, A. D.* 1908.

Present, Hon. Harry T. Toulmin, Judge, presiding.

At Law. No. 1289.

FOSTER K. HALE, JR.,
vs.
GERMAN ALLIANCE INSURANCE CO.

This case coming on to be heard on demurrers to the complaint as amended, and being argued by the attorneys, and duly considered by the Court, it is ordered by the Court that said demurrers be and the same are hereby overruled. On motion therefor and by leave of the Court the plaintiff withdraws counts 1 to 12 inclusive.

Pleas to Complaint.

Comes the defendant and for answer separately to each count of the complaint pleads as follows:

12 1st. In short, by consent, the general issue.

2nd. For further answer to said complaint the defendant says, that in and by the policy of insurance upon which this suit is based, it is provided and stipulated and made a condition thereof in substance as follows:

"Iron Safe Clause.

Warranty to Keep Books and Inventories and to Produce Them in Case of Loss.

The following covenant and warranty is hereby made a part of this policy.

1st. The assured will take a complete itemized inventory of stock on hand at least once in each calendar year, and unless such inventory has been taken within twelve calendar months prior to the date of this policy, one shall be taken in detail within thirty days of issuance of this policy, or this policy shall be null and void from such date, and upon demand of the assured the unearned premium from such date shall be returned.

2nd. The assured will keep a set of books, which shall clearly and plainly present a complete record of business transacted, including all purchases, sales and shipments, both for cash and credit, from date of inventory, as provided for in the first section of this clause and during the continuance of this policy.

3rd. The assured will keep such books and inventory, and also the last preceding inventory, if such has been taken, securely locked in a fire-proof safe at night.

In the event of failure to produce such set of books and inven-

tories for the inspection of this company, this policy shall become null and void, and such failure shall constitute a perpetual bar to any recovery thereon."

And defendant avers that the assured wholly disregarded the terms, stipulations and conditions of said policy in the following respects, to-wit: 1st. He did not keep a set of books as therein provided; 2nd. He did not keep said books securely locked in a fireproof safe at night, and at other times as therein provided; 3rd. He failed to produce said books for the inspection of the defendant after said alleged loss, wherefore said policy became and was null and void.

And the defendant says by reason of the failure and re-
13 fusal of said plaintiff to comply with the said covenant and warranty in the said particulars, the said plaintiff is not entitled to recover in this action, nor to have and maintain this action against the defendant.

3rd. That the policy of insurance in this case was taken out by one W. M. Hallett who claimed to be the owner of the property insured; that at the time of the issuance of said policy he had made a mortgage or bill of sale of same to one William Vizard which was still in force, which fact was unknown to the defendant and by the terms of its policy rendered same null and void.

4th. That the policy of insurance in this case was taken out by one W. M. Hallett who claimed to be the owner of the property insured; that at the time of the issuance of said policy he had made a mortgage or bill of sale of same to one William Vizard which was still in force, which fact was unknown to the defendant and was concealed from the defendant by the said Hallett and by the terms of its policy rendered same null and void.

5th. For further answer to the complaint the defendant says, that the plaintiff has never made proof of loss as required by the policy under which he sues.

6th. For further answer to the complaint the defendant says that by the terms of the policy sued on, it is provided that any sum for which the defendant is liable pursuant to said policy shall be payable sixty days after due notice, ascertainment, estimate, and satisfactory proof of the loss having been received by the company in accordance with the terms of the policy, and defendant avers that said period of sixty days had not expired when this suit was brought. Wherefore defendant says that plaintiff ought not to have or maintain this action.

7th. For further answer to the complaint, the defendant says that under and by the terms of the policy which is the foundation of this suit, it is provided that said policy shall be void if the interest of the assured in the property insured be not truly stated. And the defendant avers that the interest of W. M. Hallett, the assured, in the property insured was not truly stated and by reason thereof the said policy was void.

14 8th. For further answer to the said complaint the defendant says, that in and by the policy of insurance upon which this suit is based, it is provided and stipulated and made a condition

thereof as follows: "This entire policy unless otherwise provided by agreement endorsed hereon or added thereto, shall be void if the insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy."

The defendant avers that the assured wholly disregarded the terms, stipulations and conditions of said policy in this: that he did at the time of the issuance of said policy to him have, or did thereafter procure another contract of insurance on the property covered by said policy.

And defendant avers that no agreement was endorsed on said policy providing for or allowing such other contracts of insurance. Wherefore defendant says that plaintiff is not entitled to recover in this action, nor to have or maintain in this action against the defendant.

9th. At the time this suit was commenced the premium in consideration of which said policy was issued, amounting to $60.62 had not been paid and is still due and unpaid with interest thereon, from the 23rd day of February, 1907, which the defendant hereby offers to set off against the demand of the plaintiff.

10th. The policy of insurance upon which this suit was brought was taken out by and issued to one W. M. Hallett, and at the time of the issuance thereof said Hallett was in possession of information to the effect that said property would be destroyed by an incendiary, which information he concealed from the defendant.

11th. The policy of insurance upon which this suit is brought was procured by and issued to one W. M. Hallett, and the sole consideration therefor was the premium of $60.62 which said Hallett agreed to pay to the defendant but wholly failed and refused to do so and thereby there was a failure of the consideration upon which said contract was based and no recovery ought to be had under said policy against it.

SHELTON SIMS.
PILLANS, HANAW & PILLANS.
J. H. WEBB.

Filed Jan'y 16, 1908.
RICH'D JONES, *Clerk*.

15 *Demurrers to Pleas.*

In the Circuit Court of the United States for the Southern District of Alabama.

FOSTER K. HALE, JUNIOR,
vs.
GERMAN ALLIANCE INSURANCE COMPANY OF NEW YORK.

Comes the plaintiff in said cause and demurs to plea numbered 2nd upon the following separate grounds:

1. It does not appear that the plaintiff is bound by the provision of said policy alleged in said plea.

2. It appears from the pleadings that the property insured was of such character that the provisions of said policy set up in said plea could not be applicable thereto.

3. It does not appear that the property insured was of such character that the provisions of said policy set up in said plea were applicable thereto.

4. It is not made to appear by said plea that there were any purchases, sales and shipments or other business transacted from the time of the issuance of the said policy until the time of the loss which affected or related to in any manner the property insured.

Plaintiff demurs to plea numbered 3rd upon the ground that the provision of the said policy referred to therein is not effective against or binding upon this plaintiff.

Plaintiff demurs to plea numbered 4th upon the ground that the provision of the said policy referred to therein is not effective against or binding upon this plaintiff.

Plaintiff demurs to pleas numbered 5th and 6th upon the ground that under the averments of the complaint plaintiff became entitled to institute and prosecute this suit immediately after loss without proof or delay of any kind.

Plaintiff demurs to plea numbered 7th upon the following separate grounds:

1. The said plea is vague, uncertain and indefinite in that it fails to show what statements were made by the said W. M. Hallett relative to his ownership of said property and wherein said state-
16 ments were untrue.

Plaintiff demurs to plea numbered 9th upon the following separate grounds:

1. It appears from the pleadings in this case that the said policy was issued to said Hallett who presumably is liable for the premium thereon, and nothing is shown which makes plaintiff liable for the payment of said premium.

2. The facts set up in said plea show no liability on the part of the plaintiff to the defendant of which the defendant may avail itself in a plea of setoff.

Plaintiff demurs to plea numbered 11th upon the following separate grounds:

1. The said plea shows upon its face that the defendant received a consideration for the issuance of said policy, namely, the binding and valid agreement of the said Hallett to pay the premium thereon.

2. The said plea merely shows that the defendant credited the said Hallett for the premium on said policy, and that the said Hallett has failed to pay said premium which is no defence to an action by this plaintiff on said policy.

3. The said plea does not deny that the policy sued upon in this case was a valid and existing contract of insurance at the time of the happening of the loss averred in the complaint.

4. It does not appear from the said plea that the said policy was

ever cancelled, rescinded or annulled because of the said nonpayment of the premium.

FOSTER K. HALE, JR.,
GREGORY L. & H. T. SMITH,
STEVENS & LYONS,
For Plaintiff.

Filed Jan'y 16, 1908.
RICH'D JONES, *Clerk.*

Pleas 12 & 13.

FOSTER K. HALE
vs.
GERMAN ALLIANCE INS. CO.

17 12. Comes the defendant and for further plea and answer to each of the counts in plaintiff's amended complaint, avers that since the institution of this suit the plaintiff hath agreed with the American Central Insurance Company, another underwriter corporation in which the same goods insured by defendant in and by the policy sued on were insured by a like policy in the sum of two thousand dollars by said policy the loss being made payable to said Hale to the extent of his interest in the insured property by which agreement said American Central Insurance Company hath compounded the claim of said Hale on said other policy for the sum and agreed to pay him the amount of two thousand dollars wherefore to that extent his interest is reduced. This plea being interposed as a defense only to said amount of said compromise.

13. And for further plea to each count to the extent hereinafter set forth, defendant avers that by the terms of the policy sued on it was provided that the defendant should in the event of any loss on the property described not be liable under said policy for a greater proportion of any loss than the amount insured defendant's policy shall bear to the whole insurance covering said property. And defendant avers that at the time of the loss sued on, the property in said defendant's complaint described was covered by another policy of insurance issued to said Hallett loss payable to said F. K. Hale to the extent of his interest made by another underwriter towit: the American Central Insurance Company in the sum of two thousand dollars against the same losses insured against in the policy sued on. Wherefore this defendant is liable only for four sixths of said loss and pleads this plea as to all.

JAS. H. WEBB,
SHELTON SIMMS,
Att'ys for Def't.

Filed Jan'y 20, 1908.
RICH'D JONES, *Clerk.*

Demurrers to Pleas 12 & 13.

FOSTER K. HALE, JR.,
vs.
GERMAN ALLIANCE INS. CO.

18 Comes the plaintiff and demurs separately to pleas Nos. 12 and 13 upon the following separate grounds:

1st. The said pleas purport to answer only a portion of each of the counts to which they are directed.

2nd. The said pleas go only to the measure of damages.

3rd. The said pleas do not fully answer the counts to which they are pleaded.

4th. The said pleas neither deny nor confess and avoid the averments of the counts to which they are directed.

FOSTER K. HALE,
G. L. & H. T. SMITH,
STEVENS & LYONS,
For Plaintiff.

Fiiled Jan'y 20, 1908.
RICH'D JONES, *Clerk.*

Order on Demurrers to Pleas.

MONDAY, *January 20th, A. D.* 1908.

Present: Hon. Harry T. Toulmin, Judge presiding.

At Law. No. 1289.

FOSTER K. HALE, JR.,
vs.
GERMAN ALLIANCE INSURANCE CO.

This case coming on to be heard on demurrers filed January 16th, 1908, to pleas filed on that date, and being argued by the attorneys and duly considered by the Court, it is ordered by the Court the demurrers to pleas 2, 5, 6 and 11 be and the same are hereby sustained, and that all other demurrers of said date to pleas of said date be and the same are hereby overruled. And the defendant now filing pleas Nos. 12 & 13 to which the plaintiff files demurrers, and the same being argued by the attorneys and duly considered by the Court, it is ordered by the Court that the demurrer to plea 12 be and the same is hereby sustained and that the demurrer to pleas 13 be and the same is hereby overruled. On motion therefor and by leave of the Court defendant withdraws plea 8.

Verdict of Jury & Judgement Thereon.

WEDNESDAY, *January* 22, *A. D.* 1908.

Present: Hon. Harry T. Toulmin, Judge presiding.

19 November Term, 1907.

At Law. No. 1289.

FOSTER K. HALE, JR.,
vs.
GERMAN ALLIANCE INSURANCE CO.

This day come the plaintiff and defendant by the attorneys and to try the issue joined comes a jury of good and lawful men, towit: Harry T. Hartwell and eleven others being duly elected, tried, and sworn, upon their oaths do say—We the jury find for the plaintiff and assess the damages at $5,198.93 as follows:

Insurance and interest	$4,264.00
Penalty	1,000.00
	$5,264.00
Less balance premium & interest	65.07
	$5,198.93

HARRY T. HARTWELL, *Foreman.*"

It is therefore, considered, ordered, and adjudged by the Court that the plaintiff, Foster K. Hale, Jr., do have and recover of the defendant, German Alliance Insurance Company, a corporation, the said sum of Five thousand one hundred and ninety eight & 93/100 Dollars ($5198.93) together with the costs of the case for which execution may be issued.

Order Continuing Motion for New Trial.

SATURDAY, *May 2nd, A. D.* 1908.

Present: Hon. Harry T. Toulmin, Judge presiding.

November Term, 1907.

At Law. No. 1289.

FOSTER K. HALE, JR.,
vs.
GERMAN ALLIANCE INSURANCE CO.

The motion for a new trial filed herein having been submitted and taken under consideration by the Court and the same not

being disposed of, it is, on motion of attorneys for defendant, ordered by the Court that said motion be and the same is hereby continued to the next term of the Court.

Opinion as to Reduction of Judgement.

FOSTER K. HALE, JR.,
vs.
GERMAN ALLIANCE INS. CO.

In re Motion for New Trial.

20 There were 300,000 feet of timber insured for $6000.00. The timber was totally destroyed by fire. The plaintiff was entitled to recover his loss, which was the value of the timber at the time and place of loss.

There being no proof of the market value of the timber at the place of its location in Baldwin County, Alabama, at the time it was destroyed. It was necessary and admissible to ascertain what its value was at the nearest market,—the City of Mobile,—deducting therefrom the cost of transporting the timber from the place where it was burned to the City of Mobile, and thus determine its value at the former place. This was the only feasible method of arriving at the value of the timber that could be adopted under the circumstances of the case.

There were six witnesses who testified as to the value of the timber—some who had seen it, and others, as *experts*, who had not seen it, and who testified hypothetically. One witness (Smoot) testified, after glancing at the book of specification*d* while on the witness stand, that the timber "if merchantable, should be worth about $19.00 or $20.00 a thousand feet." He had never seen the timber, and had not given the specifications book a thorough or even careful examination, but only a glance while on the witness stand. His testimony was not positive, and did not impress me as being very reliable owing to lack of knowledge evinced by the witness on the subject about which he was testifying. The value of the timber, as testified to by the other witnesses, ranged from $16.00 to $18.50 per thousand feet. Witness Hallett, who manufactured, owned and measured the timber, testified that $18.00 was the price he had been offered for it, and that it cost 75 cents a thousand to get it to Mobile, the place of delivery.

It appearing that the witness Hallett was better acquainted with the subject-matter, and having no reason to believe him at all biased, at least in favor of the defendant, I consider his evidence as to the value of the timber more reliable than that of the other witnesses.

The jury evidently found their verdict on the evidence of witness Smoot, and for the highest value suggested by him, namely,
21 $20.00 a thousand feet, and that without making any allowance for the cost of transportation of the timber to the nearest market—Mobile. The aggregate value found was $6000.00; $2000. having already been paid left $4000.00 which, with interest

and penalty, less premium due, amounts to $5198.93, the amount of the verdict.

My opinion is that this verdict was not justified by the evidence, and is excessive. I find the full value of the timber not to exceed $5175.00. Deduct $2000. paid, add interest and 25% penalty, and deduct premium due and unpaid, leaves $4112.68.

After careful consideration, I have concluded to sustain a verdict for $4112.68; and if the plaintiff is willing to reduce the verdict to that amount, it may stand; otherwise, there must be a new trial granted because of the excessive damages awarded.

"In requiring the remission of what the court deems excessive it does nothing more than requires the relinquishment of so much of the damages as, in its opinion, the Jury has improperly awarded." 116 U. S., 642; 142 U. S., 682.

See attached hereto a statement of the figures by which I have reached the result announced by me.

HARRY T. TOULMIN, *Judge.*

Verdict by Jury.

Insurance & Interest	$4,264.00
Penalty	1,000.00
	$5,264.00
Less balance premium & interest	65.07
	$5,198.93

Reduced Judgment.

300,000 ft. Timber @ $17.25 pr. M	$5,175.00
Less heretofore paid	2,000.00
	$3,175.00
Interest	209.00
	$3,384.00
Penalty 25% on $3,175.00	793.75
	$4,177.75
Less balance premium & int.	65.07
	$4,112.68

Filed May 9, 1908.

RICH'D JONES, *Clerk.*

22 *Order Reducing Judgment.*

Saturday, May 9, A. D. 1908, May Term, 1908.

Present: Hon. Harry T. Toulmin, Judge presiding.

At Law. No. 1289.

FOSTER K. HALE, JR.,
vs.
GERMAN ALLIANCE INSURANCE CO.

This case having been submitted on the motion filed by the defendant to set aside the verdict of the jury and the judgment rendered thereon in the sum of $5198.93 and the same being duly considered by the Court, the Court is of opinion that the said verdict is excessive; it is, therefore, ordered by the Court that the said verdict and the judgment thereon be and the same is hereby set aside and a new trial granted unless the plaintiff shall within ten days from this date, by a proper paper filed herein, agree to a reduction of said verdict to the sum of $4112.68, remitting the excess above that sum, in which event and upon the filing of said remittitur and reduction of the said verdict and judgment thereon to said sum of $4,112.68, then the said judgment shall stand in said sum and said motion for a new trial denied, otherwise upon failure of plaintiff to file herein said paper agreeing to said reduction and remission of the excess above said sum of $4,112.68 the said verdict shall be set aside and a new trial awarded. The Court reserves control of said judgment for $5198.93 for the purpose of carrying this order into effect.

Acceptance by Plaintiff of Reduction of Judgment.

Circuit Court of the United States for the Southern District of Alabama.

At Law. No. 1289.

FOSTER K. HALE, JR.,
vs.
GERMAN ALLIANCE INSURANCE COMPANY.

The defendant in said cause having moved the Court for a new trial upon the ground among others that the verdict of the jury was excessive, and the Court upon consideration of the said motion having found that the verdict was excessive to the extent of
23 one thousand eighty six and 11/100 dollars (1086.11), and having entered an order on the 9th day of May, 1908, reducing the judgment in this cause to four thousand, one hundred twelve and 68/100 dollars ($4112.68), provided that plaintiff file an agreement thereto within ten days from the date aforesaid, and

having further ordered that if such agreement be not filed within time aforesaid, the said motion for a new trial be granted.

Now comes the plaintiff and in compliance with the aforesaid order consents and agrees that his judgment in this cause be reduced to four thousand one hundred twelve and 68/100 dollars ($4112.68), plus the costs of this cause, in all respects as contemplated and provided in the Court's aforesaid order of May 9th, 1908.

F. K. HALE, JR.,
Plaintiff.

STEVENS & LYONS,
F. K. HALE, JR.,
Attorneys for Plaintiff.

Filed May 14, 1908.
RICH'D JONES, *Clerk.*

Bill of Exceptions.

Circuit Court of the United States for the Southern District of Alabama.

At Law. No. 1289.

FOSTER K. HALE, JUNIOR,
vs.
GERMAN ALLIANCE INSURANCE COMPANY.

Be it remembered that on the 22d day of January, 1908, a day in the November Term, 1907, of the Circuit Court of the United States, held for the Southern District of Alabama, in Mobile, upon the trial of the case at law of Foster K. Hale vs. German Alliance Insurance Company the following proceedings were taken and had:

Plaintiff introduced evidence tending to show that one Hallett was the owner of a large amount of sawn timber at or near Byrnes pond in Baldwin County a great part of which was piled in stacks there, aggregating in quantity upwards of three hundred thousand feet. That while he was so the owner of said timber and on to-wit, the 23rd day of February, 1907, the said Hallet procured the same to be insured against fire by two certain policies of insurance, one issued by the German Alliance Insurance Company defendant herein, in the sum of Four thousand dollars and the other by another insurance company in the sum of two thousand dollars both
24 being contemporaneously issued and covering the same risk and providing for the same loss aggregating six thousand dollars of insurance so taken by said Hallet on property described as follows:

"On lumber and square timber while stacked on the banks of Byrnes pond near Bay Minette, Baldwin County, Alabama, said lot of lumber and timber containing three hundred thousand feet, loss if any payable to Foster K. Hale, Jr., as his interest may appear at the time of the fire.

Plaintiff further introduced evidence tending to show that said Hallett had mortgaged the said timber, prior to the said insurance of the same, to the plaintiff Foster J. Hale, Jr., to secure an indebtedness owed by said Hallett to him, amounting to more than six thousand dollars, and that the same remained unpaid; and plaintiff further offered evidence tending to show that the said property so insured in the said two policies of insurance that of the defendant and the other one was of the value of sixteen to twenty dollars per thousand superficial feet. And that the insured property was totally destroyed by fire subsequent to the issuance of said policies and before this suit, without fault of said plaintiff or said Hallett.

Plaintiff also introduced evidence tending to show that the defendant company upon whose policy of insurance said suit was brought belonged to or was a member of or connected with the South Eastern Tariff Association, an association engaged in fixing rates of premium of insurance as averred in sundry counts of plaintiff's complaint.

This was all the evidence introduced by plaintiff.

Defendant offered evidence upon the amount and value of the insured timber destroyed by fire and other evidence upon the question of the truth or falsity of the representations of ownership by the said Hallett in the said insurance policy and rested his case.

The policy of insurance sued on which was put in evidence by plaintiff contained a clause providing as follows:

"This company shall not be liable under this policy for a greater proportion of any loss on the described property, or for loss by and expenses of removal from premises endangered by fire, than the amount hereby insured shall bear to the whole insurance, whether valid or not, or by solvent or insolvent insurers, covering such property, and the extent of the application of the insurance under this policy, or the contribution to be made by this company in case of loss, may be provided for by agreement or condition written hereon or attached or appended hereto. Liability for reinsuring shall be as specifically agreed hereon."

25 Defendant further offered in evidence the other insurance policy in the sum of two thousand dollars upon the same property, to cover same risks as the insurance policy issued by the defendant company, which other policy was issued in the sum of two thousand dollars by the American Central Insurance Company, whose policy was except in amount identical with all the provisions of the policy of the defendant sued on, and which policy was payable like the policy sued on, to Foster K. Hale, Jr., as his interest may appear, and which policy was outstanding at the time of said destruction of the insured property by fire.

And defendant further offered evidence tending to show that this policy had been settled by agreement of said American Central Insurance Company to pay two thousand dollars to the said Foster K. Hale, Jr.

Defendant introduced no further evidence.

The defendant on the 22nd day of February, a day in said term, moved the court to set aside the verdict in the case and grant a new

trial, and the court continued this motion to the next term of the court, and at the said May term, 1908, the court acted upon the said motion as appears upon the records.

Wherefore and that the facts above recited may appear upon the record the said defendant now here tenders this his bill of exceptions in said cause to the Honorable H. T. Toulmin, the judge presiding in said court upon such trial in the said cause, and prays that the same may be signed and sealed as the bill of exceptions of the said defendant in said case, which is now accordingly done on this the 19th day of June, A. D. 1908.

HARRY T. TOULMIN, *Judge.*

Filed June 19, 1908.
RICH'D JONES, *Clerk.*

Assignment of Error.

THE GERMAN ALLIANCE INSURANCE COMPANY, Plaintiff in Error,
vs.
FOSTER K. HALE, JR., Defendant in Error.

26 Plaintiff in error in the above entitled cause in connection and contemporaneously with the filing of its petition for the allowance of a writ of error in the said cause to the Supreme Court of the United States herewith makes and files its assignment of error and says that in the record and proceedings in the above entitled case there is manifest error in this, to-wit:

1. That the court erred in overruling the demurrers of the defendant below to the second count of the said plaintiff's complaint, for that the recovery sought under said account was sought under a statute of Alabama contained in Section 2619 of the Code of Alabama. The ground of error being:

(*a*) That the said section of the said Code is in conflict with the constitution of the United States and is void.

(*b*) That the said section of the said Code of Alabama is in violation of the fourteenth amendment of the constitution of the United States, in that said section of said Code in inflicting such penalty and permitting such recovery of twenty five per cent beyond the loss assumed by the policy of insurance, deprived said defendant below, the German Alliance Insurance Company of its property without due process of law; and also denies to it the equal protection of the law.

2. The court erred in overruling the demurrer interposed to each the third, fourth, fifth, the sixth, the seventh, the eighth, the ninth, the tenth, the eleventh and twelfth counts of the said complaint, severally, said demurrer to each of the said counts setting up that the said section 2619 of the said Code upon which plaintiff sues to recover twenty five per cent more than the value of the insured property destroyed under the provisions of the statute of Alabama, contained in section 2619 of the Code of Alabama, is in violation of the Constitution of the United States and is void; the particular

ground of error being that the said section 2619 of the Code of Alabama is in violation of the fourteenth amendment of the Constitution of the United States, in that said section 2619 of said Code in inflicting said penalty and permitting said recovery of twenty
27 five per cent deprived said defendant the German Alliance Insurance Company of its property without due process of law; it also denies to it the equal protection of the law.

3rd. The court erred in refusing to sustain and in overruling the demurrer of the defendant to the additional count of the plaintiffs said complaint, numbered 13th upon the several grounds assigned in said demurrer, in which said count plaintiff sues to recover twenty five per cent more than the value of the insured property destroyed under the provisions of section 2619 of the Code of Alabama, the said demurrer alleging that the said section 2619 of said Code is in violation of the Constitution of the United States and is void, the ground of error assigned being that the said section 2619 of said Code of Alabama is in violation of the fourteenth amendment of the Constitution of the United States, in that in inflicting said penalty and permitting said recovery of twenty five per cent in excess of the loss sustained by the assured, said statute of the state deprives said defendant, the German Alliance Insurance Company, of its property, without due process of law, and denies to it the equal protection of the law.

4th. The court erred in refusing to sustain and in overruling the demurrer of the defendant to the additional count of the plaintiffs said complaint, numbered 14th upon the several grounds assigned in said demurrer, in which said count plaintiff sues to recover twenty five per cent more than the value of the insured property destroyed under the provisions of section 2619 of the Code of Alabama, the said demurrer alleging that the said section 2619 of said Code is in violation of the Constitution of the United States and is void, the ground of error assigned being that the said section 2619 of said Code of Alabama is in violation of the fourteenth amendment of the Constitution of the United States, in that, in inflicting said penalty and permitting said recovery of twenty five per cent in excess of the loss sustained by the assured, said statute of the state deprives said defendant, the German Alliance Insurance Company, of its property without due process of law, and denies to it the equal protection of the law.

28 5th. The court erred in refusing to sustain, and in overruling, the demurrer of the defendant to the additional count of the plaintiff's said complaint, numbered 15th upon the several grounds assigned in said demurrer, in which said count plaintiff sues to recover twenty five per cent more than the value of the insured property destroyed under the provisions of section 2619 of the Code of Alabama, the said demurrer alleging that the said section 2619 of said Code is in violation of the Constitution of the United States and is void, the ground of error assigned being that the said section 2619 of said Code of Alabama is in violation of the fourteenth amendment of the Constitution of the United States, in that in inflicting said penalty and permitting said recovery of twenty five per cent in

excess of the loss sustained by the assured, said statute of the state deprives said defendant the German Alliance Insurance Company of its property without due process of law, and denies to it the equal protection of the law.

6th. The court erred in refusing to sustain and in overruling the demurrer of the defendant to the additional count of the plaintiff's said complaint numbered 16th upon the several grounds assigned in said demurrer, in which said count plaintiff sues to recover twenty five per cent more than the value of the insured property destroyed under the provisions of section 2619 of the Code of Alabama, the said demurrer alleging that the said section 2619 of said Code is in violation of the Constitution of the United States and is void, the ground of error assigned being that the said section 2619 of said Code of Alabama is in violation of the fourteenth amendment of the Constitution of the United States, in that in inflicting said penalty and permitting said recovery of twenty five per cent in excess of the loss sustained by the assured, said statute of the state deprives said defendant the German Alliance Insurance Company of its property without due process of law, and denies to it the equal protection of the law.

7th. The court erred in refusing to sustain and in overruling the demurrer of the defendant to the additional count of the plaintiff's said complaint, numbered 17th upon the several grounds assigned in said demurrer, in which said count plaintiff sues to recover twenty five per cent more than the value of the insured property destroyed under the provisions of section 2619 of the
29 Code of Alabama the said demurrer alleging that the said section 2619 of said Code is in violation of the Constitution of the United States and is void, the ground of error assigned being that the said section 2619 of said Code of Alabama is in violation of the fourteenth amendment of the Constitution of the United States, in that in inflicting said penalty and permitting said recovery of twenty five per cent in excess of the loss sustained by the assured, said statute of the state deprives said defendant the German Alliance Insurance Company of its property without due process of law, and denies to it the equal protection of the law.

8th. The court erred in refusing to sustain and in overruling the demurrer of the defendant to the additional count of the plaintiff's said complaint, numbered 18th upon the several grounds assigned in said demurrer, in which said count plaintiff sues to recover twenty five per cent more than the value of the insured property destroyed under the provisions of section 2619 of the Code of Alabama, the said demurrer alleging that the said section 2619 of said Code is in violation of the Constitution of the United States and is void, the ground of error assigned being that the said section 2619 of said Code of Alabama is in violation of the fourteenth amendment of the Constitution of the United States, in that in inflicting said penalty and permitting said recovery of twenty five per cent in excess of the loss sustained by the assured, said statute of the state deprives said defendant the German Alliance Insurance Company of its property without due process of law, and denies to it the equal protection of the law.

9th. The court erred in sustaining the demurrers of the plaintiff below to the plea numbered two interposed by the defendant, in which plea the defendant set up as a defense, the neglect and failure of the plaintiff to show performance of provisions, contained in the contract of insurance, precedent to his right of recovery thereon, and the neglect to perform sundry duties imposed upon him by the terms of the contract of insurance as a condition to his right of recovery, and a disregard by the plaintiff of sundry stipulations and conditions of the policy in regard to the taking of an inventory of the
30 stock of lumber, and to the keeping of books and their being locked in a fire proof safe at night, and the production of such books for the inspection of defendant.

10th. The court erred in sustaining the plaintiff's demurrer to the fifth plea by defendant pleaded, by which plea the defendant averred and set up that the plaintiff had never made proof of loss as required by the policy under which he sued; said demurrer being sustained under section 2619 of the Code of Alabama authorizing in certain cases suit without proof of loss; defendant now here alleging as error in said ruling, that said section 2619 of the Code is in violation of the fourteenth amendment of the Constitution of the United States in this; that the said section invalidates the terms of defendant's contract in respect to proofs of loss, while not invalidating identical provisions in contracts of other underwriters not members of any Tariff Association or any other like association, or otherwise related to a Tariff Association in the manner prescribed in said section of the said Code of Alabama, and thereby denies to defendant the equal protection of the law, and also takes the property of the defendant without due process of the law, and said statute violates the obligations of the contract made by the parties thereto.

11th. The court erred in sustaining the plaintiff's demurrer to the sixth plea by defendant pleaded, by which plea the defendant averred and set up that the plaintiff had never made proof of loss as required by the policy under which he sued, said demurrer being sustained under section 2619 of the Code of Alabama without proof of loss; defendant alleging as error in said ruling that said section 2619 of the Code is in violation of the fourteenth amendment of the Constitution of the United States in this; that the said section invalidates the terms of defendant's contract in respect to proofs of loss while not invalidating identical provisions in contracts of other underwriters not members of any Tariff Association or any other like association, or otherwise related to a Tariff Association in the manner prescribed in said section of the Code of Alabama, and thereby denies to defendant the equal protection of the
31 law, and also takes the property of the defendant without due process of the law, and said statute violates the obligation of the contract.

12th. The court erred in entering judgement upon the verdict of the jury, for an amount in excess of the value found by the jury of the goods insured with interest, and erred in entering judgement for a penalty of one thousand dollars upon the verdict of the jury assessing the value of the property separately from such penalty; the ground of error being, that said penalty so assessed against said

defendant was assessed under section 2619 of the Code of Alabama, which section of said Code is in violation of the fourteenth amendment of the Contstitution of the United States, and in the imposition of such penalty so provided for, deprived the said defendant of its property without due process of law and also denied to it the equal protection of the law.

Wherefore the said German Alliance Insurance Company prays that judgement in the Circuit Court may be reversed.

JAS. H. WEBB,
SHELTON SIMS,
PILLANS, HANAW & PILLANS,
Att'ys for Ger. All. Ins. Co.

Filed July 7, 1908.
RICHARD JONES, *Clerk.*

Petition for and Order Allowing Writ of Error.

United States Circuit Court for the Southern District if Alabama.

No. 1289.

FOSTER K. HALE, JR., Plaintiff,
vs.
GERMAN ALLIANCE INSURANCE COMPANY OF NEW YORK, Defendant.

Now comes the German Alliance Insurance Company of New York the defendant in the above entitled cause, and says and shows to the court:

That on to-wit, the 22nd day of January, 1908, the said Circuit Court entered a judgement in said cause in favor of the plaintiff and against the defendant, which judgement was thereafter on to-wit, the 9th day of May 1908, reduced by remittiter entered by the plaintiff, to a lesser amount; in which said final judgement and the
32 proceedings had prior thereto in this cause, certain errors were committed to the prejudice of this defendant, all which will in detail appear upon the assignment of errors filed herewith.

Wherefore and forasmuch as in said case a law of Alabama was claimed to be in contravention of the Constitution of the United States this defendant prays that a writ of error may issue in this behalf out of the Supreme Court of the United States for the correction of the errors so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be made and certified to the said Supreme Court of the United States.

JAS. H. WEBB,
SHELTON SIMS,
PILLANS, HANAW & PILLANS,
Att'ys for Pl't'ff in Error.

Filed on —— —, —.

The writ of error prayed for is allowed and the judgement shall stand superseded upon the defendant entering with approved sureties into a supersedeas bond in double the amount of the said judgement as it now stands.

July 7/08.

HARRY T. TOULMIN, *Judge.*

Filed and duly entered July 7, 1908.

RICH'D JONES, *Clerk.*

Bond under Writ of Error.

Circuit Court of the United States for the Southern District of Alabama.

FOSTER K. HALE, JR., Plaintiff,
vs.
THE GERMAN ALLIANCE INSURANCE COMPANY OF NEW YORK, Defendant.

Know all men by these presents that we the German Alliance Insurance Company of New York as principal and G. B. Thames and Lloyd D. Batre, as sureties, are held and firmly bound unto the above named Foster K. Hale Jr. in the sum of Eight thousand two hundred & twenty five & 36/100 dollars ($8225.36) to be paid to the said Foster K. Hale Jr. for the payment of which well and truly to be made, we bind ourselves and each of us, our and each of our successors, heirs, executors and administrators jointly and severally, firmly by these presents.

Sealed with our seals and dated the 16 day of July in the year of our Lord one thousand nine hundred and eight.

33 Whereas the above named German Alliance Insurance Company hath sued out a writ of error to the Supreme Court of the United States to reverse the judgement rendered in the above entitled suit by the Circuit Court of the United States for the Southern District of Alabama:

Now therefore the condition of this obligation is such, that if the above named German Alliance Insurance Company of New York, plaintiff in error shall prosecute said writ of error and appeal to effect — answer all damages and costs if it shall fail to make said appeal good and pay and satisfy such judgement as shall be entered and rendered against it, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

GERMAN ALLIANCE INSURANCE CO., [SEAL.]
By SHELTON SIMS, *Att'y.* [SEAL.]
G. B. THAMES. [SEAL.]
LLOYD D. BATRE. [SEAL.]

Sealed and delivered, taken and acknowledged this 16 day of July A. D. 1908.

RICH'D JONES, *Clerk.*

Approved

HARRY T. TOULMIN,
District Judge.

Filed July 16, 1908.

RICH'D JONES, *Clerk.*

Citation.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to Foster K. Hale, Junior, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error sued out and filed in the office of the clerk of the circuit court of the United States for the southern district of Alabama, at Mobile, Alabama, wherein the German Alliance Insurance Company, a corporation, is plaintiff in error and you, said Foster K. Hale, Junior, are defendant in error, to show cause, if any there be, why the judgment rendered against said German Alliance Insurance Company as in said
34 writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties aforesaid in this behalf.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States this the 16th day of July A. D. 1908.

HARRY T. TOULMIN,
U. S. District Judge for the Southern District of Alabama, Presiding in U. S. Circuit Court for said District.

Attest:

[SEAL.] RICHARD JONES,
Clerk U. S. Circuit Court, Sou. Dist. of Alabama.

We hereby accept service of this citation and acknowledge receipt of a copy of same this July 16th, A. D. 1908.

STEVENS & LYONS,
Attorneys for Defendant in Error.

Filed this July 16th, A. D. 1908.

RICHARD JONES, *Clerk.*

35 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the Circuit Court of the United States for the Southern District of Alabama, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court of the United States for the southern district of Alabama, fifth judicial circuit, before you or some of you, in the common law case No. 1289 wherein Foster K. Hale, Junior, is plaintiff, and the German Alliance Insurance Company, a corporation, is defendant, a manifest error has happened to the great damage of the said German Alliance Insurance Company, defendant, as by its complaint appears. We being willing that error, if any has been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington within thirty days from the date hereof, in the said Supreme Court of the United States, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, and the seal of the Circuit Court of the United States for the Southern District of Alabama, at the city of Mobile, Alabama, this the 16th day of July, A. D. 1908.

RICH'D JONES, *Clerk.*

Allowed by

HARRY T. TOULMIN,
U. S. District Judge, Presiding in U. S. Circuit Court for the Southern District of Alabama.

Filed this July 16th, A. D. 1908.

RICH'D JONES,
Clerk U. S. Circuit Court, Southern District of Alabama.

36 *Certificate of Clerk to Transcript.*

I, Richard Jones, Clerk of the Circuit Court of the United States for the Southern District of Alabama, do hereby certify that the foregoing thirty four typewritten pages, numbered from 1 to 34 both inclusive, contain a true copy of the record, assignment of error, and

all the proceedings had in this court in the case therein stated, towit, No. 1289 at common law, Foster K. Hale, Junior, versus The German Alliance Insurance Company, a corporation, as fully as the same remains on file and of record in my office as such clerk, and that the same constitute the return to the writ of error sued out in said case by said German Alliance Insurance Company hereto attached as page 35.

In testimony whereof, I hereto set my hand and affix the seal of said court at the city of Mobile, Alabama, this the 20th day of July A. D. 1908.

[Seal United States Circuit Court, Southern Dist. of Ala.]

RICH'D JONES, *Clerk.*

Endorsed on cover: File No. 21,302. S. Alabama C. C. U. S. Term No. 237. German Alliance Insurance Company, plaintiff in error, vs. Foster K. Hale, Jr. Filed August 12th, 1908. File No. 21,302.

UNITED STATES SUPREME COURT.

OCTOBER TERM, 1909.

No. 237.

GERMAN ALLIANCE INSURANCE COMPANY
vs.
FOSTER K. HALE, JR.

It is hereby agreed between the undersigned counsel of record in the above entitled cause that the papers hereto attached constituting a part of the record in this case not included in the original transcript, may now be filed the same as if they had been originally certified up by the Clerk as a part of the record and be so treated.

ALEX. C. KING,
H. PILLAUS,
Of Counsel for German Alliance Insurance Company.
GREGORY L. SMITH,
T. M. STEVENS,
Of Counsel for Foster K. Hale, Jr.

Circuit Court of the United States for the Southern District of Alabama.

No. 1289. At Law.

FOSTER K. HALE, JR.,
versus
GERMAN ALLIANCE INSURANCE COMPANY OF NEW YORK.

Petition for Removal.

In the Circuit Court of Mobile County, Alabama.

FOSTER K. HALE, JR.,
vs.
GERMAN ALLIANCE INSURANCE COMPANY OF NEW YORK.

To the Honorable Samuel B. Browne, Judge, of the Thirteenth Judicial Circuit of the State of Alabama:

Your petitioner the German Alliance Insurance Co., of New York shows to this Honorable Court that it is the defendant in the above entitled cause; and that the matter and amount of this cause exceeds the sum of two thousand dollars exclusive of interest and costs. That the controversy herein is between citizens of different states; that the plaintiff is and was at the time of the commencement of this suit a citizen of the State of Alabama and residing in the City and County of Mobile in said State, and that your petitioner the German

Alliance Insurance Co., of New York was at the time of the commencement of this suit and still is a corporation created and organized under the laws of the State of New York and having its principal place of business therein.

Petitioner herewith tenders a sufficient bond in form required by law for the removal of causes to the United States Court.

Wherefore petitioner prays that its security and bond be accepted and this suit may be removed to the Circuit Court of the United States for the Southern District of Alabama, to be held at Mobile, Alabama, pursuant to the statutes of the United States in such cases made and provided, and that no further proceedings may be had herein in this court.

GERMAN ALLIANCE INSURANCE COMPANY OF NEW YORK,
By TERRY L. MOORE.

J. H. WEBB &
SHELTON SIMS,
Attorneys.

STATE OF ALABAMA,
Mobile County:

Personally appeared before me Robert A. Howard, a notary public in and for the State and County aforesaid, Terry L. Moore, who being duly sworn deposes and says that he is the agent of the German Alliance Insurance Company of New York and as such is authorized to make this petition for and on behalf of the German Alliance Insurance Company of New York and the matters therein stated are true.

ROBERT A. HOWARD.

Subscribed and sworn to before me this 28th day of June, 1907.

[SEAL.] ROBERT A. HOWARD,
Notary Public, Mobile County, Alabama.

Filed in Office June 28th, 1907, S. H. Smith, Clerk.

Bond for Removal.

STATE OF ALABAMA,
Mobile County:

Know all men by these presents, That the German Alliance Insurance Company of New York, Terry L. Moore and W. L. Reynolds are held and firmly bound unto Foster K. Hale, Jr., in the sum of five hundred dollars to be paid to the said Foster K. Hale, Jr., his executors, administrators or assigns, for which well and truly to be made, we jointly and severally bind ourselves, our heirs, executors and administrators.

Sealed with our seals and dated this the 28th day of June 1907.

The condition of the above obligation is such that, whereas, the

above bounden, the German Alliance Insurance Company of New York has filed its petition in the Honorable Circuit court of Mobile County praying for the removal into the United States Circuit Court for the Southern District of Alabama, of a certain cause in which said Foster K. Hale, Jr., is plaintiff and said German Alliance Insurance Company of New York is defendant.

Now if the said German Alliance Insurance Co., of New York shall enter in the United States Circuit Court for the Southern District of Alabama at the first day of its next term hereafter to be held, a copy of the record of said suit, and shall pay all costs of such removal in the said Circuit Court *of* the United States shall hold that said cause was wrongfully or improperly removed, then this obligation shall be void, otherwise it shall remain in full force and effect.

GERMAN ALLIANCE INSURANCE COMPANY
OF NEW YORK.
By TERRY L. MOORE, *Agt.* [SEAL.]
TERRY L. MOORE. [SEAL.]
W. L. REYNOLDS. [SEAL.]

Filed in Office June 28th, 1907.
S. H. SMITH, *Clerk.*

Order of Removal.

Circuit Court of Mobile County, Alabama.

FOSTER K. HALE, JR.,
vs.
GERMAN ALLIANCE INSURANCE COMPANY OF NEW YORK, a Corporation.

This cause coming on for a hearing upon application of the defendant herein for an order transferring this cause to the United States Circuit Court for the Southern District of Alabama, and it appearing to the Court that the defendant has filed its petition for such removal in due form of law, and that the defendant has filed its bond duly conditioned with good and sufficient surety, as provided by law, and it appearing to the Court that this is a proper cause for removal to said Circuit Court.

Now therefore, it is hereby ordered and adjudged that this cause be and it hereby is removed to the United States Circuit Court for the Southern District of Alabama, and the clerk is hereby directed to make up the record in said cause for transmission to said Court forthwith.

Done in open Court this the first day of July A. D. 1907.

SAM'L B. BROWN, *Judge.*

Filed in office July 1st 1907.
S. H. SMITH, *Clerk.*

Order Granting Motion for Removal of Cause to United States Circuit Court.

On the 1st day of July A. D. 1907, the same being a regular day of the Circuit Court of Mobile County, Alabama, it was ordered as follows in this cause, to-wit:

FOSTER K. HALE, JR.,
vs.
GERMAN ALLIANCE INSURANCE CO.

Motion for Order of Removal to United States Circuit Court, Granted.

This day came the parties by their Attorneys and the defendant's Motion for an Order of Removal of this cause to the United States Circuit Court, coming on to be heard and understood by the Court; it is ordered and adjudged by the Court that the defendant's said Motion be and the same is hereby Granted and said cause is ordered Removed to the United States Circuit Court at Mobile, Ala.

Clerk's Certificate to Transcript.

THE STATE OF ALABAMA,
Mobile County:

I, S. H. Smith, Clerk of the Circuit Court in and for Mobile County, State of Alabama, do hereby certify, that the foregoing pages numbered from (1) one to nine (9) both inclusive, contains a full, true and correct Transcript of the Record and Proceedings had in the said Circuit Court, in a certain cause therein lately pending wherein Foster K. Hale, Jr., was plaintiff and the German Alliance Insurance Company of New York was defendant as the same remains of record in my office.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court at office in City of Mobile, this the 11th day of July A. D. 1907.

[SEAL.]

S. H. SMITH,
Clerk Circuit Court Mobile County, Alabama.

I, Richard Jones, Clerk of the Circuit Court of the United States for the Southern District of Alabama hereby certify that the foregoing pages 1 to 5 is a full, true and correct transcript of the petition for removal, the Bond and orders of the Circuit Court of Mobile County Alabama and the certificate of the Clerk of said Court in the removal of the case of Foster K. Hale, Jr., versus German Alliance Insurance Company of New York from the Circuit Court of Mobile County, Alabama to the Circuit Court of the United States for the Southern District of Alabama as the same appears in the record on file in my office.

Witness my hand and the seal of said Circuit Court of the United States affixed this 9th day of March, A. D. 1910, at Mobile, Alabama.

[Seal United States Circuit Court, Southern Dist. of Ala.]

RICH'D JONES,
Clerk U. S. Circuit Court, Sou. District of Alabama.

[Endorsed:] File No. 21,302. Supreme Court U. S. October Term, 1909. Term No. 237. German Alliance Insurance Co., Pl'ff in Error, vs. Foster K. Hale, Jr. Stipulation of Counsel and addition to record. Filed April 8, 1910.

In the Supreme Court of the United States

OCTOBER TERM, 1909.

No. 237.

GERMAN ALLIANCE INSURANCE COMPANY, Plaintiff in Error. vs. FOSTER K. HALE, Junior, Defendant in Error.	}	IN ERROR. To the United States Circuit Court for the Southern District of Alabama.

Brief of Alex. C. King, for Plaintiff in Error.

STATEMENT OF THE CASE.

On June 4, 1907, Foster K. Hale, Jr., a citizen of Alabama, brought suit in the Circuit Court of Mobile County, Alabama, against German Alliance Insurance Company, of New York, a foreign corporation doing business in said county, to recover four thousand dollars, the total amount of its policy issued February 23, 1907, and also for one thousand dollars additional, under the Statute of Alabama hereinafter set forth.

This original complaint, consisting of twelve counts, was afterwards, on January 20, 1908, withdrawn, by leave of the Court, and the case tried on the Counts of the Second Amendment, as supplemented by a third amendment.

The original complaint and the demurrer filed thereto are therefore not set out. (Transcript, p. 10.)

The case was removed to the United States Circuit Court for the Southern District of Alabama, at Mobile, Alabama. (Additional Transcript, pp. 1-3.)

The plaintiff filed in said United States Court, by amendment, additional counts numbers 13 to 18, inclusive, which made this case.

Plaintiff claimed of the defendant $5,000 with interest, $4,000 thereof being the value of a lot of square timber stacked at Byrne's Mill Pond, near Bay Minette, Baldwin County, Alabama, which defendant on February 27, 1907, insured for one year against loss or injury by fire.

That said timber was wholly destroyed by fire on March 30, 1907. That defendant has had notice of said loss. That at the time of making said contract defendant was a member of the Southeastern Tariff Association, which fixed the rates for said insurance. (Transcript, pp. 4, 5, 6.)

The defendant demurred separately to each count of said amendment to said complaint, numbered respectively 13 to 18 inclusive, upon the grounds,

1st. That they stated no cause of action.

2nd. That they did not show that plaintiff had any interest in the property destroyed.

3rd. They did not show what interest plaintiff had therein.

4th. They did not show for what amount the property was insured.

5th. Because they showed on their face that the amount claimed was greater than the value of the property destroyed with interest thereon.

6th. Because they sought to recover twenty-five per cent. more than the value of the property, under Section 2619, of the Code of Alabama, which section is in violation of the Constitution of Alabama, and void.

7th. Because they sought to recover twenty-five per cent. more than the value of the property, under Section 2619, of the Code of Alabama, which section is in violation of the Constitution of the United States, and void.

8th. Because they sought to recover twenty-five per cent. more than the value of the property, under Section 2619, of the Code of Alabama, which section is in violation of inalienable rights of a citizen, and is void.

9th. Because said section is unreasonable, unjust and void.

10th. Because they failed to state the amount of the loss suffered by the plaintiff, under said policy of insurance. (Transcript, pp. 7, 8.)

On January 15, 1908, plaintiff filed a third amendment, adding to each of the counts 13 to 18, inclusive, (2nd Amendment) the allegation that by the terms of the policy sued on it was provided, "Loss, if any, payable to Foster K. Hale, Jr., as his interest may appear at the time of fire." That the property belonged to W. M. Hallett, but that at the time of the issuance of the policy, and at all times since that Foster K. Hale, Jr., held a mortgage on the property securing an unpaid debt of $6,000 owing to him from said Hallett, that the entire debt was still due and unpaid. (Transcript, pp. 8, 9.)

The defendant on January 16, 1908, refiled all of its aforesaid demurrers to the complaint as thus amended. (Transcript, p. 9.)

On January 20, 1908, the Court overruled defendant's demurrers to said complaint as thus amended. (Transcript, p. 10.)

Defendant filed to each count of said complaint the following pleas:

1st. The general issue.

2nd. Breach of the iron safe clause of the policy, which provided that the insured should keep a set of books, clearly and plainly presenting a complete record of business transacted, including all purchases, sales or shipments, both for cash and credit, from the date of inventory (required to be taken by said clause) and during

the continuance of the policy of insurance, and should keep the same securely locked in a fire-proof safe at night; and which covenanted that a failure to produce such set of books and inventory for the inspection of the insurer should render the policy null and void, and constitute a perpetual bar to recovery thereon. That the assured broke said covenant in that (1st) He failed to keep said set of books as provided; (2nd) He did not keep said books securely locked in a fire-proof safe at night and as provided; (3rd) He failed to produce them for inspection of the defendant after loss.

3rd. Defendant also further pleaded that the policy was taken out by, and issued to, one W. M. Hallett, as owner of the property insured; that at the time said policy was issued he had made a mortgage, or bill of sale, to one William Vizard, which was still in force, which fact was unknown to defendant and by the terms of the policy rendered it void.

4th. Defendant also averred the same facts as to the making and existence of the mortgage, or bill of sale, to William Vizard, and averred that such facts were unknown to defendant, were concealed by plaintiff, and by the terms of the policy, rendered it null and void.

5th. Defendant further pleaded that no proofs of loss had been made, as required by the policy sued on.

6th. Defendant further pleaded that said policy was by its terms only payable sixty days after due notice, ascertainment, estimate and satisfactory proofs of loss had been received by it, and that said period of sixty days had not elapsed when suit was brought.

7th. Defendant further pleaded that by the terms of said policy sued on it was to be void if the interest of W. M. Hallett in the property insured was not truly stated; that such interest was not truly stated, and that therefore said policy was void.

(Plea 8th was afterwards withdrawn. Transcript 15.)

9th. Defendant further pleaded that the premium due on said policy—$60.62—had not been paid, and set off the amount, with interest from February 23, 1907, against plaintiff's demand.

10th. Defendant further pleaded that Hallett at the time of procuring said policy sued on had information that said property would be destroyed by an incendiary and concealed same from defendant.

11th. Defendant further pleaded that Hallett wholly failed and refused to pay the agreed premium on said policy; that there was a failure of the consideration upon which said contract was based, and that no recovery could be had thereon. (Transcript, pp. 10, 11, 12.)

By amendment defendant added two pleas.

12th. That the plaintiff, Hale, had received from another insurer on said property two thousand dollars on his loss, which reduced his interest to that extent.

13th. That the policy sued on provided that defendant's liability in case of loss should be for no greater proportion thereof than the amount insured by it bore to the whole insurance on said property. That at the time of the fire there existed a policy of insurance thereon for $2,000, issued by the American Central Insurance Company, to said Hallett, with loss payable to said Hale to the extent of his interest, insuring the same losses covered by the policy sued on, wherefore defendant was liable, if at all, only for four-sixths of any loss. (Transcript, p. 14.)

Plaintiff demurred to all of the pleas except those numbered 1st, 8th (withdrawn) and 10th, which demurrers were sustained by the Court, as to pleas 2, 5, 6, 11 and 12. (Transcript, pp. 12, 13, 14, 15.)

The plea No. 2, as to the iron safe clause, was demurred to on the ground that the iron safe clause was inapplicable to property of the character insured; also that the plea did not aver that any purchases, sales or shipments had been made during the time covered by the policy contract. (Transcript, p. 13.)

Pleas 5 and 6 were demurred on the grounds that under the Alabama Statute the provisions of the policy as to proofs of loss, etc., are not binding and suit can be brought immediately after loss, without proof or delay. (Transcript, p. 13.)

Plea 11 was demurred to on the grounds that Hallett's

promise to pay the premium was a sufficient consideration to support the policy contract; that the plea shows he was credited therefor and that his failure to pay is no defense to plaintiff's action; that the plea does not deny that the policy was a valid existing contract at time of loss; and that there has been no rescission or cancellation thereof. (Transcript, pp. 13, 14.)

Plea 12 was demurred to upon the grounds that it answered only a portion of the counts to which directed; that it went only to the measure of damages; that it did not fully answer the counts to which pleaded; that it neither denied, nor confessed, and avoided, the averments of such counts. (Transcript p. 15.)

The case was tried on January 22, 1908, before a jury, which returned a verdict reading (omitting formal parts) as follows:

"We the jury find for the plaintiff and assess the damages at $5,198.93, as follows:

Insurance and interest	$4,264.00
Penalty	1,000.00
	$5,264.00
Less balance premium and interest	65.07
	$5,198.93"

(Transcript, p. 16.)

Judgment was thereupon entered for this sum, with costs of the case. (Transcipt, p. 16.)

A motion for new trial was made, and upon consideration thereof, the Court rendered an opinion and judgment, finding that the verdict was excessive as to the value of the property; that the highest proven value was $5,175, of which sum $2,000 had already been paid from other insurance. The Court therefore finds that the verdict should not have exceeded this sum, less $2,000 ($3,175) with interest and 25 per cent. penalty added, from which the premium due and unpaid should be deducted, leaving as the proper verdict $4,112.68.

If plaintiff would remit the excess over this sum, the new trial was denied. The Court attached a statement of figures showing how the sum of $4,112.68 was reached. (Transcript, pp. 17, 18.)

The plaintiff accepted the reduction and the motion for new trial was thereupon denied. (Transcript pp. 19, 20.)

On the trial the plaintiff proved that one Hallett was the owner of upwards of 300,000 feet of sawn timber piled in stacks located at or near Byrnes Pond, in Baldwin County, Alabama; that on February 23, 1907, he procured two policies insuring said property against loss by fire, one issued by defendant for $4,000, one by another insurance company for $2,000, both covering the same risk, providing for the same loss as follows:

"On lumber and square timber while stacked on the banks of Byrnes Pond, near Bay Minette, Baldwin County, Alabama, said lot of lumber and timber containing 300,000 feet. Loss, if any, payable to Foster K. Hale, Jr., as his interest may appear at time of fire."

The interest of Hale at time of fire was also proven to be as stated in the complaint; also that the property insured was worth from $16 to $20 per thousand superficial feet. The total destruction by fire of said property without fault on the part of Hallett or plaintiff was also proven.

Proof tending to show that the defendant belonged to, or was a member of, or connected with, the South-Eastern Tariff Association, an association engaged in fixing rates of premium of insurance, as averred by plaintiff, was adduced.

The policy sued on, introduced in evidence, contained a clause to the effect that defendant's liability for any loss proven thereunder was only pro rata as the amount thereof is to the total insurance, whether valid or invalid, solvent or insolvent.

This was all of the evidence adduced by the plaintiff. (Transcript, pp. 20, 21.)

Defendant offered evidence, inter alia, of the issuance of an additional policy on the same risk, payable in like manner with defendant's policy, made by the American Central Insurance Company, upon which Hale had collected $2,000 on account of the loss involved in this suit.

Defendant introduced no further evidence. (Transcript, p. 21.)

The motion for new trial having been over-ruled, on July 7, 1908, the defendant, German Alliance Insurance Company of New York, presented its petition for a writ of error out of this Court, which petition was granted, said writ issued and citation issued and was served (Transcript, pp. 26, 29.)

ASSIGNMENTS OF ERROR.

The assignments of error filed with said petition, though numerous, present only the following points:

1. That the Court erred in overruling the defendant's demurrers to the complaint, attacking the constitutionality of the Alabama Statute, Code Section 2619, as being unconstitutional under the 14th Amendment to the Constitution of the United States; said Statute, in inflicting the penalty, and permitting the recovery, of twenty-five per cent. beyond the loss assumed in the policy, deprived the defendant of its property without due process of law, and also denies to it the equal protection of the law. (Assignments 1-8.)

These assignments are separately made as to each count of the complaint and amended complaint. (Transcript, pp. 22-24.)

2. That the Court erred in sustaining plaintiff's demurrer to defendant's plea number two, setting up the failure to perform the conditions precedent to a right of recovery and a failure to observe the iron safe clause as to taking an inventory and keeping a set of books, keeping them locked in a fire-proof safe at night and producing them for defendant's inspection. (Assignment 9.) (Transcript, p. 25.)

3. That the Court erred in sustaining plaintiff's demur-

rers to defendant's pleas 5 and 6, that defendant had not made proofs of loss as required by the policy sued on; these demurrers being sustained under Section 2619 of said Code of Alabama, which authorizes suits immediately, without such proofs being made when the defendant is a member of, or connected with a tariff association, or other like association, said section thus invalidating defendant's contract as to proofs of loss, while not invalidating identical provisions in contracts of other underwriters not members of a tariff or other like association; this section denying to defendant the equal protection of the law and also taking its property without due process of law. (Assignments 10 and 11.) (Transcript, p. 25.)

4. That the Court erred in entering judgment for more than the value of the property destroyed as found by the jury with interest, and in entering judgment for said penalty of one thousand dollars, the verdict separately finding and assessing said value; and said penalty being assessed under said Section 2619 of the Code of Alabama, which is in violation of the 14th Amendment of the Constitution of the United States, depriving defendant of its property without due process of law and also denying to it the equal protection of the law. (Assignment 22.) (Transcript, pp. 25, 25.)

BRIEF OF LAW.

I.

The Statute of Alabama (Code of 1896, Section 2619), attacked as unconstitutional, is not a condition to the doing of business in the State imposed on foreign corporations; neither is it a penalty put upon one class of litigants; neither is it a part of the costs of one class of cases. It is a discrimination imposed upon a part of the class, to-wit, fire underwriters, and not upon others, who may have the same contract, the same defenses, who may have charged the same premium and may be in the same relation to the insured.

The sections of the Code of Alabama embracing this Statute are as follows:

"**Contract of insurance made by company belonging to tariff association construed to add twenty-five per cent. to face of policy.** Every contract or policy of insurance hereafter made or issued, shall be construed to mean that in the event of loss or damage thereunder, the assured or beneficiary thereunder may, in addition to the actual loss or damage suffered, recover twenty-five per cent. of the amount of such actual loss, any provision or stipulation in such contract or policy to the contrary notwithstanding; **provided,** at the time of the making of such contract or policy of insurance, or subsequently, before the time of trial, the insurer belonged to, or was a member of, or in any way connected with, any tariff association or such like thing by whatever name called, or who had made any agreement or had any understanding with any other person, corporation or association engaged in the business of insurance as agent or otherwise about any particular rate of premium which should be charged or fixed for any kind or class of insurance risk; and **provided further,** no stipulation or agreement in such contract or policy of insurance to arbitrate loss or damage nor to give notice or to make proofs of loss, shall in any such case be binding on the assured or beneficiary, but right of action accrues immediately upon loss or damage."

"**Jury finding certain facts must add amount of penalty to verdict, etc.** If it is shown to the reasonable satisfacton of the jury, by a preponderance of the weight of the testimony that such insurer at the time of the making of such agreement or policy of insurance, or subsequently before the time of trial belonged to, or was a member of, or in any way connected with, any tariff association or such like thing, by whatever name called, either in or out of this

state, or had made any agreement, or had any understanding either in or out of this state with any person, corporation or association, engaged in the business of insurance as agent or otherwise about any particular rate of premium which should be charged or fixed for any risk of insurance on any person or property, or on any kind or class of insurance risk, they must, if they find for the assured or beneficiary, in addition to his actual damages, assess and add twenty-five per cent. of the amount of such actual loss, and judgment shall be rendered accordingly, whether claimed in the complaint or not."

Code of Alabama, of 1896, Sections 2619, 2620.
Code of Alabama, of 1907, Sections 4594, 4955. . .

These sections are referred to by the numbers in the Code of 1896, this being the Code referred to in the Record.

This Section 2619 is the part of the Statute inflicting the forfeiture of this sum. The Section 2620 but prescribes the means to carry the former section into effect. It serves, however, to explain it.

It will be noticed that this Statute does not forbid membership in any association, nor does it define what is meant by the words, tariff association, or other like association.

It is also to be noted that the insurance contract may have been issued **before** the insurer had become a member of any association, or made any agreement, or had any understanding concerning rates of premium.

The rate of premium actually charged is immaterial.

If a company, not a member of any association, or a party to any agreement or understanding, charges a rate higher than its co-insurer who is such member or party, the first insurer can litigate without penalty, the second litigates at peril.

The Statute reaches such domestic fire insurance companies as are members of the designated associations equally with foreign companies. Violations of its terms,

however frequent, do not impair or forfeit the right to continue in business.

It is clearly therefore not made, or sustainable, as a condition to the doing of business.

Carroll vs. Greenwich Ins. Co., 199 U. S. 401, 409.

Fire insurance companies with identical policies written at the same rate, upon the same risk and for the same insured, may defend a case upon the same grounds, in the same court. One because not a member of a tariff association defends with impunity; its contract as to proper proofs of loss, appraisal, examination, etc., is binding. The clause of its policy providing that any sum accruing thereunder is not due until sixty days after proof of loss is furnished is binding. Its co-insurer, with an identical contract, with identical relations with the insured, fights with a rope around its neck and under a 25 per cent. penalty, and its policy is matured immediately in the face of its covenants to the contrary.

We submit that this renders the Statute void.

At least all co-insurers on the same risk should, in litigation about said risk, stand in the same class. Classification between them, for purposes of litigating identical defenses, with the same plaintiff, is unreasonable and no classification; but is a denial to a part of the same class of litigants of the equal protection of the laws.

A statute permitting holders of claims for stock killed or injured by the train of any railroad company to recover in addition to the loss sustained and costs of suit, attorneys' fees not exceeding ten dollars, where the claim was not paid within thirty days from its presentation, was held by this Court to be a denial to the railroad company of the equal protection of the laws. The Court said, **inter alia:**

> "It is simply a statute imposing a penalty upon railroad corporations for a failure to pay certain debts. No individuals are thus punished, and no other corporations. The act singles out a certain

class of debtors and punishes them when for like delinquencies it punishes no others. They are not treated as other debtors, or equally with other debtors. They cannot appeal to the courts as other litigants under like conditions and with like protection. If litigation terminates adversely to them they are mulcted in the attorney's fees of the successful plaintiff; if it terminates in their favor, they recover no attorney's fees. It is no sufficient answer to say that they are punished only when adjudged to be in the wrong. They do not enter the courts upon equal terms. They must pay attorney's fees if wrong; they do not recover any if right; while their adversaries recover if right and pay nothing if wrong. In the suits, therefore, to which they are parties they are discriminated against and are not treated as others. They do not stand equal before the law. They do not receive its equal protection. All this is obvious from a mere inspection of the Statute."

Gulf, Colorado & Santa Fe Ry. vs. Ellis, 165 U. S. 150, 153.

A State Statute, general in terms, but applying in fact to one stock-yard, was likewise declared unconstitutional, as denying the equal protection of the laws.

"Do the laws secure to an individual an equal protection when he is allowed to come into court and make his claim or defense subject to the condition that upon a failure to make good that claim or defense the penalty for such failure either appropriates all his property or subjects him to extravagant and unreasonable loss? Let us make some illustrations to suggest the scope of this thought:

"Suppose a law were passed that if any laboring man should bring or defend an action and fail in his claim or defense, either in whole or in part, he should

in the one instance forfeit to the defendant half of the amount of his claim, and in the other be punished by a fine equal to half of the recovery against him, and that such law by its terms applied only to laboring men, would there be the slightest hesitation in holding that the laborer was denied the equal protection of the law? The mere fact that the courts are open to hear his claim or defense is not sufficient if upon him and upon him alone there is visited a substantial penalty for a failure to make good his entire claim or defense. Take another illustration: Suppose a statute that every corporation failing to establish its entire claim, or make good its entire defense, should as a penalty therefor forfeit its corporate franchise, and that no penalty of any kind except the matter of costs was attached to like failures of other litigants, could it be said that the corporations received the equal protection of the laws?"

"But we may, perhaps, come closer to the particular statute when we consider the decisions of the Supreme Court of Kansas, the State by whose legislature this act was passed. In the State vs. Haun, 61 Kansas, 146, there was presented for consideration a statute providing for the payment of the wages of laborers in money coupled with this provision is section 4:

" 'Sec. 4. This act shall apply only to corporations or trusts, or their agents, lessees or business managers, that employ ten or more persons.'

"The act was held unconstitutional. After referring to an alleged defect in the title, the Court said:

"* * * * * The nine men lawfully paid for their labor in goods at a truck store might with much reason complain that the protection of the law was unequal as to them, when they saw men paid in

money for the same service performed for another corporation engaged in like business. Such inequality destroys the law. In the instance cited, two of the eleven men might quit the employment of the company for which they worked, and by this act alone make a method of payment by the corporation lawful which was unlawful while the eleven were employed. The criminality or innocence of an act done ought not to depend on the happening of such a circumstance. Equal protection of the laws means equal exemption with others of the same class from all charges and burdens of every kind. * * * A classification of the kind attempted makes a distinction between corporations identically alike in organization, capital and all other powers and privileges conferred by law. It is arbitrary and wanting in reason. The act in question is class legislation of the most pronounced character. * * * * *"

"If such legislation does not deny the equal protection of the laws, we are unable to perceive what legislation would. We think therefore that the principle of the decision of the Supreme Court of Kansas in State vs. Haun, supra, is not only sound but is controlling in this case, and that the statute must be held unconstitutional, as in conflict with the equal protection clause of the Fourteenth Amendment."

Cotting vs. Kansas City Stock Yards Co., etc., 183 U. S. 79, 100, 108.

An anti-trust statute exempting the producers of agricultural products and raisers of live stock from the terms was also condemned by this Court.

Connally vs. Union Sewer Pipe Co., 184 U. S. 540.

II.

While classification is allowed, it must not be arbitrary; it must be reasonable with relation to the subject matter, and such reasonableness is a judicial question.

Here the attempted classification is to divide litigant fire insurance companies into two classes. The division is not based on any difference of contract with the plaintiff-claimant. It is not even based on a state of facts necessarily prevailing when the insurance contract was made.

As shown, the contracts of each insurer may be identical in every respect.

Even the membership in a tariff association may have occurred after the policies were all delivered to the assured.

Even if the State could create a penalty for belonging to a tariff association and allow its recovery in a suit by an individual, this is not what is done by this Statute.

Its provision is,

> "Every contract or policy of insurance shall be construed to mean that in the event of loss or damage thereunder, the assured or beneficiary thereunder may, in addition to the actual loss or damage suffered, recover twenty-five per cent. of such actual loss, any provision or stipulation in such contract or policy to the contrary notwithstanding, **provided,** at the time of the making of such contract or policy, or subsequently before the time of trial, the insurer belonged to, or was a member of, or in any way connected with, any tariff association, etc."

The section following then provides that if it is shown to the jury by a preponderance of the testimony that the insured had been or was such member of, or connected in any manner with, any such association, "either in or out of this State", if the jury find for the assured or beneficiary, they must assess and add twenty-

five per cent. to the amount of the verdict for the actual damages.

It is a law providing one rule for construction of a private contract in one case, where the same contract between other insurance companies and the insured is differently construed.

Selection is arbitrary unless it appears to be based on some reasonable opinion that the party who is selected by the statute occupies a relation to the litigation which renders the statute one to really compensate for some greater advantage that the party selected enjoys in litigating, or some hardship that the plaintiff undergoes in litigating with this defendant and others in like case, not existing in the case of general litigants, or litigation with those whom the statute does not reach.

Now, in this case, how can the refusal to pay a loss by a fire insurance company, which is a member of a tariff association, be more unjust, or put the plaintiff to more trouble or expense, or in any different position whatever, from such refusal made by another company a co-insurer on the loss, who defends an identical contract on the same grounds?

How is an insured who litigates with a company, a member of a tariff association, defending on the ground of an excessive claim of loss which it sustains in large part, in any different position before the courts from one who is suing a company not obnoxious to this Statute, who defends frivolously and puts the plaintiff to useless expense? Yet in the first case this Statute gives the plaintiff 25 per cent. damages, besides destroying the contract in important particulars; in the other the company litigates with impunity.

As to such so-called selection, this Court has said:

> "But it is said that it is not within the scope of the Fourteenth Amendment to withhold from States the power of classification, and that if the law deals alike with all of a certain class it is not obnoxious to the charge of a denial of equal protection. While, as

a general proposition, this is undeniably true (* * * citations omitted) yet it is equally true that such classification cannot be made arbitrarily. The State may not say that all white men shall be subjected to the payment of the attorney's fees of parties successfully suing them and all black men not. It may not say that all men beyond a certain age shall be alone thus subjected, or all men possessed of a certain wealth. These are distinctions which do not furnish any proper basis for the attempted classification. That must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis." * * * * * * * * *

"But arbitrary selection can never be justified by calling it classification. The equal protection demanded by the Fourteenth Amendment forbids this. No language is more worthy of frequent and thoughtful consideration than these words of Mr. Justice Matthews, speaking for this Court, in Yick Wo vs. Hopkins, 118 U. S. 356, 369: 'When we consider the nature and theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power.' "

"The first official action of this nation declared the foundation of government in these words: 'We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty and the pursuit of happiness.'

"While such declaration of principles may not have the force of organic law, or be made the basis of judicial decision as to the limits of right and

duty, and while in all cases reference must be had to the organic law of the nation for such limits, yet the latter is but the body and the letter of which the former is the thought and the spirit, and it is always safe to read the letter of the Constitution in the spirit of the Declaration of Independence. No duty rests more imperatively upon the courts than the enforcement of those constitutional provisions intended to secure that equality of rights which is the foundation of free government. * * * *"

"It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment, and that in all cases it must appear not only that a classification has been made, but also that it is one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection."

Gulf, Colorado & Santa Fe Ry. vs. Ellis, 165 U. S. 150, 153, 155, 159, 165.

In the case of Connally vs. Union Sewer Pipe Co., cited above, this Court has said:

"What may be regarded as a denial of the equal protection of the laws is a question not always easily determined, as the decisions of this Court and of the highest courts of the States will show. It is sometimes difficult to show that a state enactment, having its source in a power not controverted, infringes rights protected by the National Constitution. No rule can be formulated that will cover every case. But upon this general question we have said that the guarantee of the equal protection of the law means 'that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and

in like circumstances.' Missouri vs. Lewis, 101 U. S. 22, 31. * * * *''

''The difficulty is not met by saying that, generally speaking, the State when enacting laws may, in its discretion, make a classification of persons, firms, corporations and associations, in order to subserve public objects. For this Court has held that classification 'must always rest upon some difference which bears a reasonable and just relation **to the act in respect to which the classification is proposed**, and can never be made arbitrarily and without any such basis. * * * * * But arbitrary selection can never be justified by calling it classification. The equal protection demanded by the Fourteenth Amendment forbids this. * * * * No duty rests more imperatively upon the courts than the enforcement of those constitutional provisions intended to secure that equality of rights which is the foundation of free government. * * * * It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment, and that in all cases it must appear not only that a classification has been made, but also that it is one based upon some reasonable ground—some difference which bears a just and proper realtion to the attempted classification—and is not a mere arbitrary selection'. Gulf, Colorado and Santa Fe Ry. vs. Ellis, 165 U. S. 150, 155, 159, 160, 165. These principles were recognized and applied in Cotting vs. Kansas City Stock Yards Co., 183 U. S. 79, in which it was unanimously agreed that a statute of Kansas regulating the charges of a particular stock yards company in the state but which exempted certain stock yards from its operation, was repugnant to the Fourteenth Amendment in that it denied to that company the equal protection of the laws. (560, 561.)

Connally vs. Union Sewer Pipe Co., 184 U. S. 540, 558, 560.

The classification of insurers into two classes, in respect to their liability on the same contract, because of membership in a tariff association, is an unreasonable and arbitrary classification in regard to such liability to the insured, and to the right of the insurer to resort to the courts on such contract.

For classification, in regard to rights of litigants, to be reasonable it must not single out persons who occupy no substantially different position to the subject matter upon which the discrimination operates. That they may differ in other respects is not sufficient; the difference must be one which puts them in a different relation to the plaintiff in respect to litigation.

III.

The statute is not a penalty, and adjudged as such for making an illegal combination. The insurer may be ever so flagrant in making a combination as to rates affecting the very risk incurred, and the proof may be conclusive as to this. It may defend successfully alone on a breach of covenant not affecting the happening of the loss, the extent of damage done, or the good faith of the plaintiff. If successful on this defense, the verdict is for the defendant, without damages of any kind.

If, however, such insurer defend against a most extortionate demand and cut it in half in the verdict. If, in addition, he have evidence tending to show most meritorious defenses, which fail only because the jury prefers to credit the unsupported oath of the insured, the verdict is for 25 per cent. more than the loss found, although the proof may show that at the time the policy was written and the rate fixed and charged, the insurer had no connection with any combination as to rates, and that the rate charged was not affected by any combination.

To speak of such exaction, as a penalty for belonging to a combination to affect rates, is to name it one thing, when the operation given it by the Courts makes it a very different thing.

The penalty falls, or not, on the insurer's head, accordingly as it wins or loses the suit brought on the policy. It is true it must be shown that it came within the description of that portion of the fire underwriters against whom the discrimination is made; but the success of his defense against the loss then determines his penalty.

If this Statute were one which in its operation was a penalty on belonging to a tariff association, or to prevent increase of rates by penalizing agreements affecting them, then it should create a penalty for such conduct, regardless of fire loss.

But a company may belong to any tariff association, or may collect premiums from a party for years; unless litigation ensues to collect a fire loss, the Statute is wholly inoperative.

On the other hand, the rate on a policy sued on may have been specially reduced by the insurer, who had then no connection with any association or other underwriter, and a loss may occur. If the defendant, at the time of suit, is a member of a tariff association, or a party to any agreement to **fix** rates of premium (not to raise them) it becomes subject to immediate suit and to a 25 per cent. multcing it on the ascertained amount of its liability, although that liability, as in this case, fully pays the loss. This is, therefore, in effect a penalty attached as a peril to the right of litigation. It is an increasing of plaintiff's rights as a litigant as against these defending insurers.

Assume that there were four co-insurers on a risk, each policy being identical in amount, premium and stipulations, no difference existing save the names of the insurers. Two of these insurers are parties to a tariff association at the time of loss.

Each defends because of excessive demands on the part of the insured. A recovery is had by the insured, but for a sum very substantially less than he claimed. The recovery shows the merit of the defense. Yet against two of these companies the plaintiff recovers 25 per cent. more than his just claim against them, and this despite the fact that they have been debarred by the Statute the right to

demand an arbitration of the values and amount of loss, as stipulated in their policy.

The two companies who did not belong to any tariff association have not seen fit to call for any arbitration; they have charged the same premium and done exactly what the other companies did, so far as the plaintiff is concerned. They have defended an identical contract on the same proof and the same finding on the facts of the dispute has been rendered. But this Statute mulcts their co-insurers 25 per cent. more than they pay.

IV.

The decisions of the Supreme Court of Alabama on this Statute overlook the true question involved in the claim made that it is void under the Fourteenth Amendment of the Constitution of the United States.

The Supreme Court of Alabama has had this Statute before it in two cases.

Continental Ins. Co. vs. Parkes, 142 Ala. 650.
Firemen's Fund Ins. Co. vs. Hellner, 49 So. 297.

The Statute is construed by them in these cases to apply equally to domestic and foreign insurance companies and to mean that in suits against such of these companies as are members of a tariff association or like thing, whether within or without the State, or are parties to any agreement for the fixing of rates of premium, they shall pay, if found liable on their contracts of insurance, 25 per cent. of the amount of such liability, in addition thereto.

Only the first of these decisions considers the question of the constitutionality of the Statute; the second says on this subject:

"The Statute was upheld as not unconstitutional

in the case of Continental Co. vs. Parkes, 142 Ala. 650, and we need only cite and reaffirm said decision."

Firemen's Fund Ins. Co. vs. Hellner, 49 So. Rep. 297.

The decision in the case of Continental Ins. Co. vs. Parkes, on this subject, is as follows:

The seventh head note reads:

"Code 1896, Section 2619, providing that if an insurer shall be a member of any tariff association, or shall have made an agreement with corporations engaged in the business of fire insurance, with reference to rates of premium, any stipulation in a policy relating to the giving of notice of proofs of loss, etc., shall be void, is valid as an exercise of the police power of the State, and applies to all insurance companies, foreign or domestic, engaged in the business of fire insurance."

The body of the opinion contains the following:

"The Statute does not create an absolute liability on an unoffending insurance company, nor does it impose a penalty for making a defense in the courts. It deprives all persons and corporations alike engaged in the business of fire insurance from demanding certain proof to be made by the assured and imposes a penalty in consequence of its violation. The manifest purpose of the Statute was to prevent monopoly and to encourage competition. The evil thus intended to be remedied was one in violation of public policy as defined by common law. The Statute only imposes a penalty on what was already offensive to public policy. It did not make that which was innocent a defense, but simply provided a punishment for doing that which was already prohibited. In other words, it is a legitimate exercise of the police power of the State. Tiedeman

on State and Federal Control of Persons and Property, Section 105. Nor is it violative of the Constitutional provision for singling out particular persons and corporations and discriminating against them. It applies alike, as above said, to all persons or corporations, domestic or foreign, engaged in the business of fire insurance. Youngblood vs. B. T. & S. Co., 95 Ala. 521; Daggs vs. Orient Ins. Co., 136 Mo. 382; Orient Ins Co. vs. Daggs, 172 U. S. 557."

It is respectfully submitted that the decision in the case of Continental Insurance Co. vs. Parkes shows affirmatively in its reasoning that what is a discrimination, by improper classification, and what is a discrimination between persons in the same class, in their right to appeal to the courts, is wholly overlooked or misapprehended.

The point under consideration in that case was a defense of a failure to make proofs to loss and a reply by the plaintiff that the defendant was a member of a tariff association.

The Court ignores,

(1st) That membership in a tariff association, while it may promote monopoly, can have no effect on the situation of the parties after a fire takes place. Each insurance company after loss is in the same relation to the claimant, whether it has made a previous agreement respecting rates or not.

(2nd) The nature of the agreement is not made a matter of any moment, an agreement, by which two companies agreed to reduce their discordant rates to one, and that the lowest, would be equally obnoxious.

(3rd) The idea that it applies to all insurance companies is fallacious. All the Court means to say is: That as every insurer which is, or becomes, a member of a tariff association, etc., is subject to the law, and every insurer will become subject if he or it comes within any of the categories named therein, it therefore applies to all in-

surers. This is very far from what is necessary. If all insurers, whether within the provisions of the Statute or not, necessarily occupy a like position in respect to litigation; if membership in a tariff association, etc., does not create some recognizable difference in respect to litigation, then the Statute does arbitrarily classify, and as the Statute does not apply to all insurers, it discriminates in respect to litigation against a part of the class, which is defendant insurers.

The decisions cited in the case of Continental Ins. Co. vs. Parkes in no way affect or touch the question raised under the Fourteenth Amendment.

In Orient Ins. Co. vs. Daggs, 172 U. S. 557, a statute of Tennessee required the value of the property insured to be fixed by the insurer and insured at the time of writing the insurance and made that conclusive evidence of such value. It applied to all insurance companies writing such risks and established a rule of evidence in such cases. It had as a sound distinction and basis, that it required the value to be fixed while the subject matter was in existence and open to inspection, to prevent dispute when by the happening of fire it would be swept away and be no longer able to be inspected, or where the damage would prevent information from inspection that could be accurately had before loss.

In each of the Statutes sustaining the recovery of counsel fees or penalties from certain classes of litigants, all persons standing in like relation to like litigation were equally dealt with and the reason for classification grew out of the nature of the suit and affected all suits of that nature alike.

In this case this Statute alters the contract made in the case of some fire underwriters, and not of all, as to proof of loss and appraisal and as to maturity of cause of action upon no rational basis of classification. It penalizes resistance of the claim by some, but not all, of said underwriters upon a like arbitrary basis.

These decisions are in conflict with previous decisions of the Supreme Court of Alabama, the principles of which

declare this Statute invalid both under the Constitution of Alabama and the Fourteenth Amendment of the Constitution of the United States.

South & North R. Co. vs. Morris, 65 Ala. 193.
Louisville & Nashville R. Co. vs. Baldwin, 85 Ala. 627.
Randolph vs. Builders' & P. S. Co. 106 Ala. 501.

The cases are quoted from hereafter in this brief.

V.

This Statute also discriminates against the insurance companies falling within its terms, as against the rest of the community, in that it penalizes them and vitiates clauses of their contracts for making any agreement fixing prices, while no such penalty or consequence is visited on any other litigant.

1. The plaintiff may be the veriest monopoly or combination in restraint of trade existing; and the Courts are open without restriction or penalty. But if the defendant belongs to a tariff association in another State, its agreement, providing for proofs of loss, for fixing the amount of loss by arbitration, making its liability mature only on compliance with these conditions precedent, or within stated periods thereafter, are set at naught. Liability, with no opportunity afforded for ascertainment, or settlement, is declared at once due and recoverable, and it contests, whether only to ascertain the amount due, or where that is admitted, because of some breach of contract, with the halter of 25 per cent. penalty about its neck.

No other defendant in the courts of Alabama defends under such conditions.

A warehouse company, for example, may belong to associations to fix rates prohibited by law, yet it can make special contracts for care of goods; it can therein require a stipulation as to values. It can provide for

notice of the claim to be filed and opportunity for investigation. It can defend without penalty.

While the State court's construction of a Statute is to be looked to in determining the effect that Statute will have as constituting a denial of the equal protection of the law, it is not the **name** that the State court may give it, but the **operation** which the decision leaves to it, which must be considered. If the operation of this Statute as construed by the Supreme Court of Alabama creates a discrimination between litigants, without any reasonable foundation therefor, or discrimination between those whom the fundamental law puts in one class, then a mere declaration that the purpose of the Statute is otherwise will not control.

Wabash, etc., R. R. Co. vs. Illinois, 118 U. S. 557.

The ruling as to this Statute for which we contend is supported by the Constitution of Alabama and the decisions of the Supreme Court.

2. The Constitution of Alabama constitutes all litigants a single class.

The Constitutions of Alabama have for many years provided as follows:

> "All corporations shall have the right to sue and shall be subject to be sued in all courts in like cases as natural persons."

Const. of 1901, Section 240.
Const. of 1875, Art. XIV, Section 12.

The Definition of a Corporation is same in each.

Const. of 1901. Section 241.
Const. of 1875, Art. XIV, Section 13.

The Bill of rights in the Alabama Constitution provides:

"That all courts shall be open, and that every person for any injury done him in his lands, goods, person or reputation, shall have a remedy by due process of law; and right and justice shall be administered without sale, denial or delay."

Const. 1901, Section 13.
Const. 1875, Art. I, Section 14.

As construing these sections see

Lassiter vs. Lee, 68 Ala. 287.
Whitword vs. Anderson, 54 Ala. 33.
Stondenmier vs. Brown, 48 Ala. 699.

The Supreme Court of Alabama has settled beyond question that no distinction can be made under the Constitution of that State between a corporation and an individual, as a litigant, or as between different persons, as litigants. In a leading case which has been consistently followed it is said:

"The clear, legal effect of these provisions is to place all persons, natural and corporate, as near as practicable, upon a basis of equality in the enforcement of their rights in the courts of this state, except in so far as may be otherwise provided in the Constitution. * * * Nor can it be permitted that litigants can be debarred from the free exercise of this constitutional right by the imposition of arbitrary, unjust, and odious discriminations, perpetrated under the color of establishing peculiar rules for a particular occupation. Unequal, partial, discriminatory legislation, which secures a right to some favored class or classes and denies it to others, who are thereby excluded from that equal protection designed to be secured by the general law of the land, is in clear

and manifest opposition to the letter and spirit of the foregoing provisions."

South & North R. R. Co. vs. Morris, 65 Ala. 193, 199, 200.
See also L. & N. R. R. Co. vs. Baldwin, 85 Ala. 627.

In another case the Court says:

"Calling it an attorney's fee does not change its real nature and effect. It is a penalty to the company, and a reward to the plaintiff, and an incentive to litigation on his part. This inequality and injustice cannot be sustained upon any principle known to the law. It is repugnant to our form of government, and out of harmony with the genius of our free institutions. The legislature cannot give to one party in litigation such privileges as will arm him with special and important pecuniary advantages over his antagonist."

Randolph vs. Builders & P. S. Co., 106 Ala. 501, 510.

The Alabama Constitution therefore constitutes all persons and corporations a single class, as to their right to resort, as plaintiffs or defendants, to the courts. Any attempt by the Legislature of Alabama to classify litigants for any cause is recognized by its own Supreme Court as unconstitutional and void, and as denying to them the equal protection of the fundamental law.

VI.

The court below erred in sustaining the demurrers to the plea setting up a breach of the iron safe clause of said policy.

The grounds of demurrer were that the iron safe clause was not applicable to a stock consisting of squared timber and lumber and that it was not alleged in the plea

that there had been any purchases, sales and shipments, and other business transacted from time of issuance of policy until time of loss, which affected or related in any manner to the policy.

It is difficult to perceive how any stock, whether timber, lumber, groceries or dry goods, which can change in bulk and specifics and which can be bought, sold and shipped in parcels, is not a proper subject matter for the iron safe clause, where the parties, by express contract, so make it.

The lumber and timber insured could have consisted of various kinds—pine, cypress, oak, and other woods. It could have been sold in lots at different times. The iron safe clause expressly contemplated that it might be added to by purchases or depleted by shipments.

Even if not added to the iron safe clause had a very full, substantial and valuable field for operation.

> "This clause constitutes a promissory warranty. It binds the assured to do certain things for the protection of the insurer and it is important as providing a check against fraud on the part of the insured and a mode by which the insurer may ascertain for itself the extent of the loss, and the compliance of the assured with this part of the contract is a condition upon which by the express terms of the contract, the validity of the policy is made to depend."

Scottish Un. & Nat'l Ins. Co. vs. Stubbs, 98 Ga. 754, 761.

Georgia Home Ins. Co. vs. Allen, 128 Ala. 451.

The courts cannot do away with a clause of a contract unless its repugnancy to the rest of it is so great that it can be given no function. It is no function of a court to make contracts for parties; nor substitute its views of the wisdom of a contract for the agreement of the parties.

Wald's Pollock on Contracts (3d Ed.) pp. (403) 523, (408) 527, et seq.

That the plea did not aver that there had been purchases, sales and shipments between the dates of the policy and loss, is not a good ground of demurrer.

Alabama is a State where Common Law pleading still prevails with replication, rejoinder, etc.

The plea set up the covenant and averred that the assured had broken it in three particulars.

1st. That he did not keep a set of books as therein provided.

2nd. That he did not keep them in a fireproof safe at night and at the other times named, as provided.

3rd. That he failed to produce said books for inspection.

If the fact that no business was done was a good reply to the plea alleging a failure to keep and produce a set of books, it is at best the assertion of a reply in confession and avoidance of a prima facie breach, which plaintiff must plead and prove. It is not an allegation which defendant must anticipate by pleading not only that the assured kept and produced no books, but also that he had made purchases, sales, shipments, etc.

If it was a fact that the assured had made no purchases, sales or shipments and had done no business, that did not prevent his opening a set of books, charging himself with his inventory, or stock on hand, etc., and if these books so kept showed no business done, then the burden would have been on the defendant to show they were untrue.

ALEX. C. KING,
Of Counsel for Plaintiff in Error.

PILLANS, HANAW & PILLANS,
SHELTON SIMS,
J. H. WEBB,
KING & SPALDING,
Attorneys for Plaintiff in Error.

Supreme Court of the United States

NO. 237

DOCKET OF OCTOBER TERM, 1909.

GERMAN ALLIANCE INSURANCE COMPANY,
Plaintiff in Error,

versus

FOSTER K. HALE,
Junior.

BRIEF OF H. PILLANS,
For Plaintiff in Error.

The defendant in error sued in the Circuit Court of Mobile upon a policy of fire insurance and the case was removed on the ground of citizenship to the Circuit Court of the United States for the Southern District of Alabama, and there tried and judgment entered on verdict for the plaintiff, which judgment is here sought to be reversed. The plaintiff's complaint was upon a fire insurance policy for four thousand dollars and claimed the four thousand and other thousand dollars besides, and was amended by inserting six new counts, more fully setting forth the plaintiff's contention. (Rec., pp. 4, 5 and 6.) The defendant demurred to the several counts of the original and amended complaint and its demurrers were overruled, and deefndant put to its pleas; and the case was tried upon the issues joined thereon, and verdict returned for the plaintiff, upon which judgment was entered.

The questions of law involved in the case are all raised upon the complaint and demurrers thereto, and also upon the demurrer of the plaintiff below to certain of the pleas interposed, and upon the verdict and judgment.

Plaintiff claimed in his complaint and sued to recover not only the four thousand dollars, as the value of the goods covered by the policy of fire insurance in that amount made by defendant, but also to recover other thousand dollars or an additional twenty-five per centum of the amount of the loss insured against, under averments made alternatively in different counts; in some, that the defendant, at the time of making the said contract of insurance, was a member of the Southern Tariff Association or had an agreement or understanding with others engaged in the business of insurance for regulating the rate or premium which should be charged or fixed for certain kinds of insurance risk; in others, claiming the said additional one thousand dollars upon the averment that the defendant **subsequent to the time of making** its contract or policy of insurance, but before the time of the trial of the cause, belonged to the Southeastern Tariff Association, or had made such an agreement or had such an understanding with other persons, corporations or associations engaged in the business of insurance. (Rec.,, p. 46.) The defendant demurred to each of the said counts claiming monies in excess of the value of the property insured; and in excess of the damage caused by its destruction by fire, because Sec. 2619 of the Code of Alabama (then in force, hich section is hereinafter set forth) is violative of the Constitution of the United States and void. (Rec., pp. 7, 8.)

These demurrers and demurrer to pleas five and six, and the entry of judgment upon the verdict of the jury for an amount in excess of the value found by the jury of the goods insured with interest, raise the principal question involved.

The statute of Alabama contained in Sec. 2619 of the Code of Alabama of 1896, is as follows:

"Contract of insurance made by company belonging to tariff association construed to add twenty-five per cent. to face of policy—Every contract or policy of insurance made or issued since the eighteenth day of February, 1897, shall be construed to mean that, in the event of loss or damage thereunder, the assured or beneficiary thereunder may, in addition to the actual loss or damage suffered, recover twenty-five per cent. of the amount of such actual loss, any provision or stipulation in such contract or policy to the contrary notwithstanding, if at the time of the making of such contract or policy of insurance, or subsequently before the time of trial, the insurer belonged to or was a member of, or in any way connected with, any tariff association or such like thing by whatever name called, or who had made any agreement or had any understanding with any other person, corporation, or association engaged in the business of insurance as agent or otherwise about any particular rate of premium which should be charged or fixed for any kind or class of insurance risk; and no stipulation or agreement in such contract or policy of insurance to arbitrate loss or damage nor to give notice or make proofs of loss or damage shall in any such case be binding on the assured or beneficiary, but the right of action accrues immediately upon los or damage."

From this it will be seen that the Alabama legislature has attempted to write a mandate for the construction of the contract of insurance, so that the same shall not mean what it says, to-wit: an indemnity for the loss or damage suffered, but shall intend and include a right in the assured to recover not only this indemnity provided for in the contract, but also an additional twenty-five per cent. of his actual loss, if the underwriter was at the time the policy issued, in anywise connected with a tariff association or had any understanding with any other underwriter concerning rates, or had even after the policy issued at any time prior to the trial of the cause, had any such understanding or connection with any tariff association or with other underwriters, concerning rates of premium. It will be seen that the statute seeks also to invalidate the contract in so far as the same requires proofs of

loss under the policy under either state of facts above mentioned.

ARGUMENT.

The Supreme Court of the State of Alabama in Continental I. Co. vs. Parkes, 142 Ala., 650, approved in two later cases, has declared this law to be constitutional; vouching in the police power as the justification for so holding.

It is submitted that this statute is an indefensible, wholly unreasonable interference with the rights of persons and the property rights of the citizen and so utterly unreasonable and extravagant in its nature and purpose, and so arbitrary in interfering with and destroying without due process of law, the rights of free dealing and contracting, as to be unconstitutional and invalid within the purview of the Fourteenth Amendment of the Federal Constitution.

The court by its ruling on the demurrers upheld the claim of the plaintiff of a right to recover upon his policy of fire insurance issued in the sum of four thousand dollars, not only his loss by fire, but also twenty-five per cent. of such loss in addition thereto, even though upon a policy issued by the company before it had transgressed any supposed public policy of the state by agreeing as to rates of premium with any other underwriter or underwriters or any tariff association, if it should be shown that at any time afterwards, howsoever long, and albeit without connection with or relation to this past transaction in which the plaintiff received his policy, it had offended what we may assume to be a policy of the law, by advising or conferring with other underwriters in relation to the rates of premium to be thereafter charged upon policies thereafter to be issued.

The only conceivable ground and the actual ground on which the Supreme Court of Alabama undertook to place its theory of the validity of this act, intruding as it does into matters of private contract, was that the statute was a statute against monopolies and therefore was valid under the police power.

Under this and all the existing laws of the State of Alabama, the policy issued by the company, prior to any conference, confederation or agreement between it or its agent and other underwriters or associations for the making of rates, was a valid contract of insurance binding in every clause. The State of Aalabama could not well have attempted to forbid the making of this contract, and it is equally clear that the State of Alabama could not by any legislation invalidate it once it became valid, merely because of anything that occurred thereafter, having no relation to the attitude of the parties to one another at the time the contract was made, and in no wise bearing upon its validity or character at that time. How, then, assuming the contract to have been thus validly made between free agents, the assured and the underwriter, can it be within the power of the state to afterwards and in consequence of subsequent acts wholly disconnected with and not related to the making or the subject mater of that contract, give a recovery to one of the parties thereto of monies in excess of those promised to be paid, by the terms of the contract? If twenty-five per cent. additional could be given, one hundred per cent. might as well be given, or five hundred per cent. The burden placed, in any case, is extraordinarily heavy and its increase would not make it the less valid if it is valid at all.

If this feature of the law could be sustained; that is to say, this feature in which it is declared that a contract which reads one way on the day of its making, shall, six months or years afterwards read another way, in behalf of one of the contracting parties, merely because of some supposed independent offense subsequently committed against the policy of the state by the other contracting party, then as well might the legislature declare that any person holding a promissory note, bond or other instrument to pay money or render service, valid as written, at the time it was made, speaking the actual terms of the contract at the time it was made, may, upon the makers offending some criminal law of the state not related to the contract, not affecting the status of the parties, become entitled to recover against him double or

quadruple the amount imposed by the valid and solemn written contract. As well might it be attempted to be made the law of Alabama that if a man who had loaned money at legal interest to scores of persons, should, at any later time before he was repaid these loans so lawfully made, be found taking usury from some other person, then that he should forfeit all right to recover from persons to whom he had loaned at legal interest, the legal interest they had promised to pay, or mayhap the entire sums so previously to them lent, or they be absolved from paying anything whatever. If such legislative experiments as the one contained in this section of the Alabama Code are sustained, then the most solemn and lawful contracts may be declared to become worthless because of some subsequent breach of or offense of one of the contractors against, any law or policy of the state.

How can it be said that this intrusion into a contract of yesterday, which was lawful yesterday, can be made, merely because of some act of one of the parties, disconnected with the contract and with the other today? How can it be said that such legislation has any reasonable tendency to aid in the legitimate accomplishment of any purpose under the police power? What real and substantial relation to a just public policy for the prevention of monoplies, can a statute have which invalidates a contract validly made by one not a party to the monoply at the time it was made?

This court determined in **Algeyer vs. Louisiana, 165 U. S., 578,** that the right to make contracts in relation to his business is part of the liberty of the individual protected by the Fourteenth Amendment of the Federal Constitution.

In **McLean vs. State of Arkansas, 211 U. S., 539-547,** this court say:

> "The police power of the state is not unlimited and is subject to judicial review and laws arbitrarily and oppressively exercising it may be annuelled as violative of constitutional rights."

And while the court in the case citede, held that the leg-

islative enactment under consideration was not an arbitrary interference with the right of contract, it must be remembered that it was dealing with, not an act which undertook to change the contract and entitle the miner to recover more than was bargained to be paid him, but an act prohibiting the making of contracts of that sort and punishing criminally those who did make such contracts as were forbidden.

Quoting from **Welch vs. Swasey:**

"The statutes have been passed under the exercise of so-called police power, and they must have some fair tendency to accomplish, or aid in the accomplishment of some purpose, for which the legislature may use the power. If the statutes are not of that kind, then their passage cannot be justified under that power. These principles have been so frequently decided as not to require the citation of many authorities. If the means employed, pursuant to the statute, have no real substantial relation to a public object which government can accomplish; if the statutes are arbitrary and unreasonable and beyond the necessities of the case; the courts will declare their invalidity. The following are a few of the many cases upon this subject: Mugler vs. Kansas, 123 U. S., 623, 661; Minnesota vs. Barber, 136 U. S., 313, 320; Jacobson vs. Massachusetts, 197 U. S., 11, 28; Lochner vs. New York, 198 U. S., 45, 57; Chicago Railway Company vs. Drainage Commissioners, 200 U. S., 561, 593."

Welch vs. Swasey et al, 214 U. S., 91, 105.

In **Lochner vs. New York** the court declares (we italicising):

"It must of course, be conceded that there is a limit to the valid exercise of the police power by the state. There is no dispute concrning this gneral proposition. Otherwise the Fourteenth Amendment would have no efficacy and the legislatures of the states would have unbounded power, and it would be enough to say that if any piece of legislation was enacted to conserve the morals, the health or the safety of the people, such legislation would be valid, no matter how absolutely without foundation the claim might be. The claim of the police power would be a mere pretext—become another and delusive name for the supreme sovereignty of the state to

be exercised free from constitutional restraint. This is not contended for. In every case that comes before this court, therefore, where legislation of this character is concerned and where the protection of the Federal Constitution is sought, the question necessarily arises: **Is this a fair, reasonable and appropriate exercise of the police power of the state, or is it an unreasonable, unnecessary and arbitrary interference with the right of the individual to his personal liberty or to enter into those contracts** in relation to labor which may seem to him appropriate or necessary for the support of himself and his family?

* * * * * *

"This is not a question of substituting the jujdgment of the court for that of the legislature. If the act be within the power of the state it is valid, although the judgment of the court might be totally opposed to the enactment of such a law. But the question would still remain: **Is it within the police power of the state?** and that question must be answered by the court."

Lochner vs. New York, 198 U. S., 45.

The Alabama court distinctly states the proposition as we are contending for it, in the opinion of Somerville, J., in the case of of the **L. & N. R. R. Co. vs. Baldwin,** as follows:

"It (the legislature) cannot take the property of one person and give it to another by naked transfer nor **impose a liability on one person for the private benefit of another** [italics ours], in the absence of some relation between the parties which brings the case within the sphere of the police power. * * * So, laws, under the guise of police regulations, may reach the constitutional deadline of property confiscation."

L. & N. R. R. Co. vs. Baldwin, 85 Ala., 619, 629.

This law being invalid in so far as it sought to alter a contract valid at the time it was entered into, because of the supposed misbehavior of one of the parties in his subsequent relations to the state; and undertaking to deprive him of his property in behalf of the other contracting party and enrich the other contracting party thus arbitrarily; this must reverse the case, because the party was put to trial under all the counts.

II.

We respectfully contend that the whole of that section of the Code is invalid; that the whole of it is unreasonable, arbitrary and not within the police power; that the whole of it is an intrusion into the rights of contract and throughout the whole of it it gives the property of one to another, **not to the state,** by way of penalty for a violation of a supposed policy of the state. We submit that upon the authorities cited and upon every principle of fairness and justice the attempt to read into the contract a term absolutely excluded by the contract, is not a reasonable and just exercise of the police power, but is unreasonable, tyrannical and arbitrary.

Moreover, we respectfully submit that the clauses of the statute can not be separated. One part being bad, it is all bad, and even had the state the right to pass a statute reading such a penalty into the contract where one of the parties was a party to a combination, it did not do this alone, but undertook to go further and to write into the contract this penalty whether the insurer was at the time of making the contract a member of a tariff association or long after became such, smiting all fire underwriters who so acted with one blow; and no man can say that the legislature would have adopted this statute with only one of these clauses in it. It is not a case in which a portion can be held bad and the balance sustained, for the simple reason that the legislature cannot be presumed to have intended to include one part and not the other if they could not include both.

Randolph vs. Bldrs. & Paint. Supp. Co., 106 Ala., 501, 513-514,

in which the court say:

> "But where the provisions are all connected in subject matter, depending on each other, operating together for the same purpose, or otherwise so connected together in meaning, that it could not be presumed the legislature would have passed the one without the other, the constitutional invalidity of the one part will vitiate the other, and both must fall together." (Citing cases.)

This case was one dealing with a mechanic's lien statute

which undertook to give a lien on land to every mechanic, firm, association, corporation or other person who wrought upon or furnished materials for buildings, etc., upon the land. The court was of opinion that, the title of the act, being "To Provide Liens for Mechanics and Materialmen," therefore the inclusion in its body of others among those performing work and labor who should be entitled to a lien, was a departure from the title, and therefore unconstitutional and invalid; and it denied validity to every part of the statute upon the grounds quoted above. See also:

Allen vs. Louisiana, 103 U. S., 80.
Pollock vs. Farm. Loan & Trust Co., 158 U. S., 601.
U. S. vs. Ju Toy, 198 U. S., 253-262.

The precise constitutional question argued above arose also upon the demurrer to the fifth and sixth pleas by defendant interposed, which pleas set up a failure of the plaintiff to make proofs of loss as required by the policy, but which the court held to afford no answer to either of the plaintiff's counts, on the mere ground that the statute relied upon in each of the counts of the complaint, excused the making of proofs. The argument in regard to the twenty-five per cent. penalty applies with equal cogency to this effort of the statute to alter the contract of the parties as to proofs of loss. What we have said applies as well to the attempted effacement from the contract of the duty to make the proofs of loss as a condition to recover, as it does to the insertion of the twenty-five per cent. penalty, and to the entry of judgment for more than the loss found by the jury.

We have not discussed in this brief the authorities upon the question of the validity of the classification attempted in this statute or the sufficiency of the second plea, because the

same has been fully and amply covered by the brief of Mr. King, of counsel for the plaintiff in error, on file.

H. PILLANS,
Of Counsel for Plaintiff in Error.

SHELTON SIMS,
J. H. WEBB,
KING & SPALDING,
PILLANS, HANAW & PILLANS,
Attorneys for Plaintiffs in Error.

In the Supreme Court of the United States

OCTOBER TERM, 1909.

NO. 237

GERMAN ALLIANCE INSURANCE COMPANY,
Plaintiff in Error,

versus

FOSTER K. HALE, Junior,
Defendant in Error.

BRIEF OF T. M. STEVENS,
For Defendant in Error.

STATEMENT OF THE CASE.

On February 18, 1897, the Legislature of Alabama passed an act designed to prevent agreements and combinations between insurance companies for the purpose of fixing rates of fire insurance. This act was printed as a part of the Code of 1896 pursuant to another act directing that the general acts of the session of 1896-7 be printed in the code adopted at that

session. The Code of 1896 was in force when this action was brought. The Code of 1907 went into effect May 1, 1908.

The said statute forms three sections of the Code of 1896, which sections are numbered and read as follows:

"2619. CONTRACT OF INSURANCE MADE BY COMPANY BELONGING TO TARIFF ASSOCIATION CONSTRUED TO ADD TWENTY-FIVE PER CENT. TO FACE OF POLICY.—Every contract or policy of insurance hereafter made or issued shall be construed to mean that in the event of loss or damage thereunder, the assured or beneficiary thereunder may, in addition to the actual loss or damage suffered, recover twenty-five per cent. of the amount of such actual loss, any provision or stipulation in such contract or policy to the contrary notwithstanding. Provided, at the time of the making of such contract or policy of insurance, or subsequently before the time of trial, the insurer belonged to, or was a member of, or in any way connected with, any tariff association or such like thing by whatever name called, or who had made any agreement or had any understanding with any other person, corporation or association engaged in the business of insurance as agent or otherwise about any particular rate of premium which should be charged or fixed for any kind or class of insurance risk; and, Provided further, no stipulation or agreement in such contract or policy of insurance to arbitrate loss or damage nor to give notice or make proofs of loss or damage shall in any such case be binding on the assured or beneficiary, but right of action accrues immediately upon loss or damage."

2620. JURY FINDING CERTAIN FACTS MUST ADD AMOUNT OF PENALTY TO VERDICT, ETC. —If it is shown to the reasonable satisfaction of the jury by a preponderance of the weight of the testimony that such insurer at the time of the making of such agreement or policy of insurance or subsequently before the time of trial belonged to, or was a member of, or in any way connected with any tariff association or such like thing by whatever name called, either in or out of this state, or had made any agreement or had any understanding either in or out of this state with any other person, corporation or association engaged in the business of insur-

ance as agent or otherwise about any particular rate of premium which should be charged or fixed for any risk of insurance on any person or property or on any kind or class of insurance risk, they must, if they find for the assured or beneficiary, in addition to his actual damages, assess and add twenty-five per cent. of the amount of such actual loss, and judgment shall be rendered accordingly.

2621. LIBERAL CONSTRUCTION TO BE GIVEN THIS ARTICLE.—This article shall be liberally construed to accomplish its object."

The defendant in eror sued the plaintiff in error upon a policy of fire insurance issued on the 23rd day of February, 1907, and claimed in such suit the penalty provided for in said section 2619, in addition to the value of the property destroyed. This suit was brought originally in the Circuit Court of Mobile County, Alabama, and was removed by the plaintiff in error to the United States Circuit Court for the Southern District of Alabama, where there was judgment for the defendant in error.

Claiming that the said statute offends certain provisions of the Constitution of the United States, plaintiff in error brings this case here for review.

Defendant in error contends:

I. That the statute in question is constitutional, and supports and authorizes every ruling complained of, except that presented by the ninth assignment of error.

II. That there is no error in the ruling of the court below here assailed by the ninth assignment of error.

I.

It will be noticed that Section 2619 confers a substantive right, while Section 2620 deals only with a matter of practice or procedure. Defendant in error has not relied in any manner upon Section 2620, but, on the contrary, has presented and litigated his claim in strict accord with the general rules of practice and procedure in force in Alabama. The case was tried upon counts 13-18 of the complaint as last amended.

(Printed Record, pp. 4, 5, 6, 8, 9 and 10). Each of these counts follows the form provided by statute, and, in addition thereto, claims the penalty and avers the facts upon which such claim is based. The substantive right conferred by Section 2619 is not at all dependent upon the provisions of Section 2620 and the former will not be affected by any invalidity of the latter. Consequently, the question of the validity **vel non** of Section 2620 is not presented, and this ~~decision~~ discussion applies only to Section 2619.

A few years ago this Court passed upon a statute of the State of Iowa which differs from the Alabama statute under consideration only in the character of penalty or punishment imposed upon the violator, and, after exhaustive consideration and discussion, held it to be constitutional and valid.

Carroll vs. Greenwich Ins. Co., 199 U. S., 401 (50: 246).

The case just cited is directly in point, and is, in itself, a complete brief demonstrating the validity of the Alabama statute under consideration and supporting such demonstration with an imposing collection of authorities.

The Supreme Court of Alabama has upheld the validity of the said statute in three separate cases.

Continental Ins. Co. vs. Parks, 142 Ala., 650.
Firemen's Fund Ins. Co. vs. Hellner, 49 Sou., 297.
Aetna Ins. Co. vs. Kennedy, 50 Sou., 73.

In the case of Continental Insurance Co. vs. Parks, **supra,** the Alabama Supreme Court thus discusses the question:

> "The 19th and 20th replications present substantially the same issue, viz., that defendant was not entitled to notice or proof of loss on account of its violation of Section 2619 of the Code, by belonging to or being connected with a tariff rate making association. The objection urged against the sufficiency of these replications is that the statute is unconstitutional. The statute does not create an absolute liability on an unoffending insurance company, nor does it impose a penalty for making a de-

fense in the courts. It deprives all persons and corporations alike engaged in the business of fire insurance from demanding certain proof to be made by the insured and imposes a penalty as a consequence of its violation. The manifest purpose of the statute was to prevent monopoly and to encourage competition. The evil thus intended to be remedied was one violative of public policy as defined by the common law. The statute only imposes a penalty on what was already offensive to public policy. It did not make that which was innocent an offense, but simply provided a punishment for doing that which was already prohibited. In other words, it is a legitimate exercise of the police power of the State. 1 Tideman on State and Federal Control of Persons and Property, Sec. 105. Nor is it violative of the constitutional provision for singling out particular persons or corporations and discriminating against them. It applies alike, as said above, to all persons or corporations, domestic or foreign, engaged in the business of fire insurance. Youngblood vs. B. T. & S. Co., 95 Ala., 521; O. Ins. Co. vs. Daggs, 136 Mo., 382; S. C., 172 U. S., p. 557."

While this discussion is not nearly so exhaustive as is the opinion of this Court in the case of Carroll vs. Greenwich Insurance Company, **supra,** yet the conclusions reached and the reasons therefor are substantially identical.

It was urged below that the statute is unreasonable in that it fixes the penalty upon the basis of a percentage of the amount of the loss, without reference to the amount of the policy. This contention does not present a constitutional question, but even if it did, the objection is removed by the construction placed upon the statute by the Supreme Court of Alabama in the following excerpt from one of the above cited decisions:

"This statute was upheld as not being unconstitutional in the case of Continental Co. vs. Parks, 142 Ala., 650, 39 South, 204, and we need only to cite and reaffirm said decision. The appellant insists, however, on a point not discussed and considered in the Parks case, **supra,** that the penalty is fixed on the loss or damage sustained, regardless of the amount of the insurance. We think the

clear intent and meaning of the statute is to authorize the recovery in the nature of a penalty of 25 per cent. on the amount to which the insured is entitled, under the policy, **ex vi termini,** 25 per cent. of the loss or damage as covered and provided for in the policy, and not 25 per cent. of the loss or damage sustained and not covered by the policy. Indeed, the trial court properly put this construction on the statute, and instructed the jury that the penalty meant 25 per cent. on the amount which the plaintiff was entitled to recover under the policy. The ruling of the trial court upon the pleading and charges as to the penalty claimed was in harmony with the statute."

Firemen's Fund Ins. Co. vs. Hellner, 49 Sou., 299.

In dealing with the statutes of a state, this Court follows and adopts the construction placed thereon by the highest court of that state.

National Cotton Oil Co. vs. Texas, 197 U. S., 115. (49: 689.)

The Iowa statutes and the Alabama statute have a common purpose, namely, to prevent combinations which impair competition in fixing fire insurance rates. The Iowa statute makes the prohibited combination a crime punishable by fine. The Alabama statute seeks to suppress the evil by giving to all who have valid claims under policies of offending insurers, a right to a penalty. In so far as concerns constitutional restrictions, Federal or State, the difference above pointed out is entirely immaterial.

Alabama is thoroughly committed to the policy of preventing all combinations in restraint of the freedom of trade, or which tend to destroy competition. The entering into any such combination with respect to "any article or commodity" is made a crime by Sections 7579-7582 of the Code of 1907. Furthermore, Section 2487 of the Code of 1907 authorizes a recovery of all damages, together with a penalty of $500.00, by any one injured by any such combination.

"Therefore, the act in question does little if anything

more than apply and work out the policy of the general law in a particular case."

Carroll vs. Greenwich Ins. Co., 199 U. S., 411.

Counsel for plaintiff in error argue that the statute in question discriminates between different insurance companies, but the only distinction pointed out is that which exists between the innocent and the guilty. If this be a sound position, then the statutes prohibiting and punishing murder are subject to like objejction because they operate alone upon the guilty. It requires only a reading of the statute to show that it does not discriminate between those who violate its terms.

It is also argued that the statute in question unduly impairs the insurer's right to defend before the courts, and the question is treated as though the right to the penalty were imposed only in the event of litigation. The statute itself clearly shows that the substantive rights of the parties are not affected in any manner by litigation or its absence, and that the insurer does not increase his liability by defending any suit brought upon the policy. In short, it is clear that the penalties imposed by the statute are not directly or indirectly aimed at an impairment of the insurer's right to defend, but they are intended as a punishment for a violation of the laws of the state. Consequently, the authorities cited by counsel for plaintiff in error declaring invalid statutes allowing attorney's fees to successful plaintiffs in litigation against certain classes of defendants, are inapplicable.

It is intimated both in the record and in opposing briefs that the statute in question impairs the obligation of contracts. This is impossible, because, by the terms of the statute, its operation is limited to those contracts made after its adoption. The relevant principle is thus stated by this Court:

"This inhibition of the Constitution is wholly prospective. The states may legislate as to contracts thereafter made, as they may see fit. It is only those in exist-

ence when the hostile law is passed that are protected from its effect."

Denny vs. Burnett, 128 U. S., 489 (32: 493).
Edwards vs. Kearzey, 6 Otto, 595 (24: 793).

A law existing when the contract is made not only does not impair the obligation of such contract, but, on the contrary, becomes a part thereof. This proposition is elementary and this Court thus forcibly states it:

"It is also the settled doctrine of this Court that the laws which subsist at the time and place of making a contract enter into and form a part of it, as if they were expressly referred to or incorporated in its terms."

Edwards vs. Kearzey, 6 Otto, 595 (24: 793).
McCracken vs. Hayward, 2 How., 612 (11: 399).
Van Hoffman vs. Quincy, 4 Wall., 535 (18: 408).

Consequently, all contracts of insurance made in Alabama subsequent to the enactment of the statute in question are to be construed as containing a stipulation that if the insurer then is, or thereafter becomes, a member of a rate-fixing combination, his liability under the policy shall be twenty-five per cent. more than that expressed in its face, and the assured shall stand relieved from all obligations to give notice, make proofs, arbitrate or postpone the bringing of suit. The contingency upon which these penalties depend is under the control of the insurer, and to avoid them, he has only to comply with a sound public policy adopted by the commonwealth in which he seeks the business.

The able brief of Mr. Pillans is devoted almost exclusively to the contention that the penalty prescribed in and by the statute under consideration is of a kind and character that the legislature has no right to impose. He impliedly admits that the acts against which the statute is directed may be punished as crimes, but argues that it is arbitrary and unreasonable to punish them by the penalities which the statute inflicts.

The statute in question is strictly a police regulation, and, therefore, presents no subject for Federal interference unless clearly arbitrary and unreasonable. This Court thus states the proposition:

> "Unless the regulations are so utterly unreasonable and extravagant in their nature and purpose that the property and personal rights of the citizen are unnecessarily, and in a manner wholly arbitrary, interfered with or destroyed without due process of law, they do not extend beyond the power of the state to pass, and they form no subject for Federal interference."
>
> **McLean vs. Arkansas, 211 U. S., 546-7 (53: 319).**
>
> **Gundling vs. Chicago, 177 U. S., 183 (44: 725).**

The case of **McLean vs. Arkansas, supra,** discusses fully the proposition now under consideration, and it is there further stated:

> "If the law in controversy has a reasonable relation to the protection of the public health, safety, or welfare, it is not to be set aside because the judiciary may be of opinion that the act will fail of its purpose, or because it is thought to be an unwise exertion of the authority vested in the legislative branch of the government."

All of the relevant authorities cited by opposing counsel support the proposition just asserted.

The evident purpose of the statute under consideration is to prevent certain combinations in restraint of trade, and it will hardly be contended that the penalties imposed will not tend to effect such purpose. They are not arbitrary or capricious, but, on the contrary, their natural and necessary tendency is to deter insurers from entering into the prohibited combinations, a policy now meeting with full approbation in Federal and State legislation, and in the decisions of the courts.

The purpose of the regulation being laudable and proper,

is it "so utterly unreasonable and extravagant in its nature" as to be condemned upon that ground?

The contention that the effect of imposing the penalty is to take one person's property and bestow it upon another is manifestly unsound. The theory upon which the statute proceeds is that which underlies every law authorizing the recovery of punitive damages or statutory penalties, namely, the punishment of the offender for the protection of society. Full payment of his debt or damage is the utmost to which any plaintiff is entitled from the standpoint of his personal or individual right, and all further recovery by him is as the authorized representative of the sovereign punishing and offender against the law. The reasor for this delegation of authority, so to speak, is based upon expediencey. An injured individual, already embroiled with the offender, and entitled to the proceeds of the prosecution, will be more effective than a dozen public prosecutors in punishing that class of wrongs the redress of which is confined by law to quasi-civil actions. But if there were no such sound reason for the policy mentioned, yet the time for which it has endured and its unquestioned recognition throughout the land would establish its wisdom, for the recovery of punitive damages was recognized in England before the Revolution, and in the United States throughout their history, and the statutes of all the states contain numerous provisions imposing penalties far beyond actual damages. In fact, one of the methods of designating the amount of the penalty is to fix it at some multiple of the actual damage. No authority questions the constitutionality of the rules which allow the recovery of exemplary damages, or of the stautes which authorize the recovery of penalties for certain classes of wrongs, and all such rules and statutes are analogous to the statute here assailed in so far as concerns the proposition now under discussion.

The selection of those who may recover the statutory penalty is based upon a reasonable classification well within the legislative discretion. Bearing in mind that the purpose of the statute is to enforce the state's anti-trust policy, can it be

said that it is unreasonable to select those who have valid claims against the offending insurers for losses incurred, as the class which will render most efficient aid in enforcing the law? They each occupy a definite contractural relation to the offender growing out of the business sought to be regulated, and they are each consumers, so to speak, of the commodity, competition as to which is sought to be preserved. We submit that their selection for the purpose mentioned is as reasonable and logical as the selection of the party injured by a tort as the agent or means for imposing punishment upon the tortfeasor.

The gist of the Alabama case cited upon this point is that the legislature has no power to bestow upon one person the property of another, or to impose upon a person against his wishes the duties, liabilities or obligations resting upon another.

L. & N. R. R. vs. Baldwin, 85 Ala., 619.

Most assuredly this is good law, but it bears no relation whatever to the state's right to punish certain infractions of law by the imposition of penalties recoverable by parties bearing certain relations to the law-breaker.

Remembering that the purpose of the law is, not to reimburse the insured, but to punish the insurer for violating the law against combinations, there can be no reason for distinguishing between contracts of insurance made before, and those made after, the entering into the prohibited combination, because the respective holders thereof have the same incentive to induce them to aid in enforcing the state's antitrust policy. Evidently the legislature thought that a policyholder who had suffered a loss and held a valid claim therefor against an offending insurer would, because of his situation, be an especially active aid to the state, and there is no reason for supposing that one whose policy was issued before the insurer had entered the prohibited combination would be any the less available for the purpose indicated than one whose policy was taken out after the insurer had entered the combi-

nation. In other words, efficient prosecution, rather than remuneration for damage suffered, is the standpoint from which the legislature selected the class to whom a reward is offered for assisting the state in preserving and upholding its policy of preventing combinations in restraint of trade.

There remains but one inquiry, and that is whether or not the punishment is so severe and far-reaching as to be classed as unreasonable and arbitrary. To so hold, the court must decide that the punishment goes so far beyond what is necessary as to shock the conscience. If an insurer persist in doing business in a state in defiance of the laws of that state promulgating a sound public policy, the state is justified in imposing whatever punishment may be found to be necessary to enforce obedience. In its nature, the statute in question will not be inadvertently violated, and those insurers who deliberately refuse obedience thereto upon the ground that its penalties are too severe, prove by their acts the fallacy of their position. But aside from this, the addition of twenty-five per cent. to each loss probably would involve a smaller expenditure by the average insurance company than would the imposing of a reasonable fine for the writing of each policy in the state.

It is respectfully submitted that there is nothing in the character, nature or extent of the punishment imposed by the statute under consideration which can authorize this Court to set aside and hold for naught the legislative will and judgment expressed in and by the enactment of the said statute.

While there are several assignments of error, yet all of them except the ninth are predicated upon the contention that the above discussed statute is unconstitutional. It is evidently so assumed in both of the opposing briefs, and, therefore, a separate discussion here of each assignment of error is deemed unnecessary.

II.

The ninth assignment of error is based upon the sustaining of the demurrer to the second plea, which plea appears on page

10 of the printed record and sets up certain warranties alleged to have been contained in the policy sued upon, and attempts to allege a breach of some of those warranties. The warranties referred to are those embraced in the "iron safe clause." They are, in substance, that the assured will take a complete itemized inventory of stock on hand at least once in each year, and that if such an inventory has not been taken within one year before the issuance of the policy, one shall be taken within thirty days after its issuance; that the assured will keep a set of books showing a complete record of the business transacted, including all purchases, sales and shipments both for cash and credit **"from date of inventory;"** that the said inventory and books be kept in a fire-proof safe at night; and that in the event of loss, the assured shall produce the books and inventories for inspection by the company. The breaches alleged are that the books were not kept as provided in said warranty; that they were not preserved in a fire-proof safe at night, and that the assured failed to produce the same for inspection after the loss. There is no breach assigned with respect to the inventory.

If it be conceded for the present and for the sake of argument, that the warranties under consideration are applicable to this case, yet it is evident that the plea in question fails to allege any breach thereof. The defect first to be considered is that the plea does not show the existence of any duty on the part of the assured to keep books, in that, under the terms of the warranty, the books were to include only those transactions occurring "after date of inventory," and there is nothing whatever in the plea to advise the court whether or not there ever was an inventory. If there was no inventory, then there was no duty to keep books, notwithstanding the fact that the failure to have the inventory, of itself, might be a breach of the warranty. In short, the obligation to keep books is conditional in its nature in that it is contingent upon there having been an inventory of the kind required. The breaches assigned overlook this feature, and proceed as though the ob-

ligation were absolute. Under elementary principles such pleading is always insufficient.

The said plea is insufficient for the further reason that there is no averment that there was any transaction of any kind or character with respect to the insured property, or any part thereof, subsequent to the issuance of the policy. There could be no records if there were no transactions to enter in them, and necessarily the duty to keep books did not arise until there was at least one transaction of a nature or character to be entered therein. Consequently, an averment that the insured did not keep books falls far short of being a sufficient allegation of a breach of the requirements of the iron-safe clause.

The indefinite legal conclusion or inference embraced in, or attributable to, the words, "as therein provided," apearing in the attempted allegations of breaches of the said warranties, presents no issuable **fact** and is without effect.

He who would charge and rely upon a breach of duty or obligation on the part of his opponent, must first aver **facts** which, if true, establish conclusively the existence of such duty or obligation, and must then allege **facts** likewise showing a failure to perform in some material particular.

Citation of authority in support of the elementary rules of pleading above relied upon is unnecessary, and, measured thereby, the plea under discussion is fatally defective.

But are not the warranties under consideration inapplicable and immaterial in this case? Are they not, because of their inherent inapplicability, mere surplusage in the policy sued upon?

Each of the several counts of the complaint which remained a part thereof at the time of the trial, alleges that the property insured was "a lot of square timber, which was stacked on the bank of Byrne's mill pond near Bay Minette, Baldwin County, Alabama." The warranties under consideration refer to "stock on hand," and clearly are intended to apply only to those situations wherein the property insured is intended to be changed by purchases and sales, the articles purchased

being added to the property covered by the policy, and the articles sold being thereby removed from its operation and effect. The property insured under the policy in question was a certain specific lot of timber in stacks or piles at a designated place. There is nothing in the complaint or plea to indicate that this timber was to be moved, or that it was a part of a stock in trade, or that there were ever to be any additions thereto or sales or shipments therefrom. On the contrary, it is evident that any additions of timber to said piles or stacks would not be covered by the policy, and that any portions of said piles or stacks which might be sold or removed would thereby be excluded from the protection of said policy.

The proposition just discussed does not appear to have been adjudicated, but in one case it is recognized.

Sowers vs. Mutual Fire Ins. Co., 85 N. W., 764 (Iowa).

The well-established rule that contracts of insurance are to be construed most strictly against the insurer, is here applicable and relevant.

THOMAS M. STEVENS,

Of Counsel for Defendant in Error.

STEVENS & LYONS,

Attorneys for Defendant in Error.

GERMAN ALLIANCE INSURANCE COMPANY *v.* HALE.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ALABAMA.

No. 56. Argued and submitted November 29, 1910.—Decided January 16, 1911.

The business of fire insurance is of an extensive and peculiar character, concerning a large number of people; and it is within the police power of the State to adopt such regulations as will protect the public against the evils arising from combinations of those engaged in such business, and to substitute competition for monopoly; and regulations which have a real substantial relation to that end and are not essentially arbitrary do not deprive the insurance companies of their property without due process of law.

All corporations, associations and individuals, within its jurisdiction, are subject to such regulations in respect of their relative rights and duties as the State may, in the exercise of its police power and in harmony with its own and the Federal Constitution, prescribe for the public convenience and the general good; and the State may also prescribe, within such limits, the particular means of enforcing such regulations.

Although the means devised by the state legislature for the enforcement of its police regulations may not be the best that can be devised, this court cannot declare them illegal if the enactment is within the power of the State.

A State is not bound to go to the full extent of its power in legislating against an evil from which it seeks to protect the public.

A statute which applies equally to all of the same class and under like conditions does not deny equal protection of the law.

A statute that applies to all insurance companies which unite with others in fixing rates to be charged by each constituent member of the combination does not deny equal protection of the law to the companies so uniting. The classification is neither unreasonable nor arbitrary, but has a reasonable and just relation to the evil which the legislation seeks to prevent.

Where defendant takes no exception to action of the trial court in sustaining demurrer to one of his pleas, but goes to trial on the merits, introduces evidence on other issues, and does not offer evidence on those raised by that plea, this court may fairly assume that he waived or abandoned it on the trial even if he has assigned as error the action of the court in sustaining the demurrer.

Sections 2619, 2620 of the Code of Alabama, 1896, as amended, §§ 4954, 4955, Code 1907, imposing on all insurance companies who are connected with a tariff association a liability to be recovered by the insured of twenty-five per cent in excess of the amount of the policy, are not unconstitutional under the Fourteenth Amendment as depriving such companies of their property without due process of law or denying them the equal protection of the laws.

THE facts, which involve the constitutionality of certain provisions of the Code of Alabama, are stated in the opinion.

Mr. Alex. C. King and *Mr. H. Pillans* for plaintiff in error:

The statute of Alabama (Code of 1896, § 2619), attacked as unconstitutional, is not a condition to the doing of business in the State imposed on foreign corporations; neither is it a penalty put upon one class of litigants; neither is it a part of the costs of one class of cases. It is a discrimination imposed upon a part of the class, to-wit,

fire underwriters, and not upon others, who may have the same contract, the same defenses, who may have charged the same premium and may be in the same relation to the insured. *Gulf, Colorado & Santa Fe Ry.* v. *Ellis*, 165 U. S. 150, 153; *Cotting* v. *Kansas City Stock Yards Co.*, 183 U. S. 79, 100, 108; *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540.

While classification is allowed, it must not be arbitrary; it must be reasonable with relation to the subject-matter, and such reasonableness is a judicial question. The division is not based on any difference of contract with the plaintiff-claimant. It is not even based on a state of facts necessarily prevailing when the insurance contract was made. The contracts of each insurer may be identical in every respect. Even the membership in a tariff association may have occurred after the policies were all delivered to the assured.

It is a law providing one rule for construction of a private contract in one case, where the same contract between other insurance companies and the insured is differently construed.

The excess liability under the statute is not a penalty, and adjudged as such for making an illegal combination. The insurer may be ever so flagrant in making a combination as to rates affecting the very risk incurred, and the proof may be conclusive as to this. It may defend successfully alone on a breach of covenant not affecting the happening of the loss, the extent of damage done, or the good faith of the plaintiff. If successful on this defense, the verdict is for the defendant, without damages of any kind.

The decisions of the Supreme Court of Alabama on this statute, *Continental Ins. Co.* v. *Parks*, 142 Alabama, 650; *Firemen's Fund Ins. Co.* v. *Hellner*, 49 So. Rep. 297, overlook the true question involved in the claim made that it is void under the Fourteenth Amendment.

These decisions are in conflict with previous decisions

of the Supreme Court of Alabama, the principles of which declare this statute invalid both under the constitution of Alabama and the Fourteenth Amendment. See *South & North R. Co.* v. *Morris*, 65 Alabama, 193; *Louisville & Nashville R. Co.* v. *Baldwin*, 85 Alabama, 627; *Randolph* v. *Builders' & P. S. Co.*, 106 Alabama, 501.

This statute also discriminates against the insurance companies falling within its terms, as against the rest of the community, in that it penalizes them and vitiates clauses of their contracts for making any agreement fixing prices, while no such penalty or consequence is visited on any other litigant. *Wabash &c. R. R. Co.* v. *Illinois*, 118 U. S. 557.

The court below erred in sustaining the demurrers to the plea setting up a breach of the iron safe clause of said policy. *Scottish Un. & Nat'l Ins. Co.* v. *Stubbs*, 98 Georgia, 754, 761; *Georgia Home Ins. Co.* v. *Allen*, 128 Alabama, 451.

The Alabama statute is an unconstitutional interference with the liberty of contract. This intrusion into a contract of yesterday, which was lawful yesterday which can be made, merely because of some act of one of the parties, disconnected with the contract and with the other, to-day, is unlawful. Such legislation has no reasonable tendency to aid in the legitimate accomplishment of any purpose under the police power.

The right to make contracts in relation to his business is part of the liberty of the individual protected by the Fourteenth Amendment. *McLean* v. *State of Arkansas*, 211 U. S. 539, 547; *Allgeyer* v. *Louisiana*, 165 U. S. 578; *Lochner* v. *New York*, 198 U. S. 45; *L. & N. R. R. Co.* v. *Baldwin*, 85 Alabama, 619, 629.

This law is invalid in so far as it seeks to alter a contract valid at the time it was entered into, because of the supposed misbehavior of one of the parties in his subsequent relations to the State; it undertakes to deprive one

contracting party of his property in behalf of the other contracting party and thus arbitrarily to enrich the latter at the expense of the former.

Mr. Thomas M. Stevens for defendant in error:

The Supreme Court of Alabama has upheld the validity of the statute involved in this case, in *Continental Ins. Co.* v. *Parkes*, 142 Alabama, 650; *Firemen's Fund Ins. Co.* v. *Hellner*, 49 So. Rep. 297; *Ætna Ins. Co.* v. *Kennedy*, 50 So. Rep. 73.

The statute does not discriminate between different insurance companies—the only distinction is that which exists between the innocent and the guilty. The statute does not discriminate between those who violate its terms. The penalties imposed by the statute are not directly or indirectly aimed at an impairment of the insurer's right to defend, but they are intended as a punishment for a violation of the laws of the State. The statute does not impair the obligation of contracts, as its operation is limited to those contracts made after its adoption. *Denny* v. *Burnett*, 128 U. S. 489; *Edwards* v. *Kearzey*, 96 U. S. 595; *McLean* v. *Arkansas*, 211 U. S. 546, 547; *Gundling* v. *Chicago*, 177 U. S. 183.

The purpose of the regulation being laudable and proper, it is not so utterly unreasonable and extravagant in its nature as to be condemned upon that ground. The contention that the effect of imposing the penalty is to take one person's property and bestow it upon another is manifestly unsound.

The selection of those who may recover the statutory penalty is based upon a reasonable classification well within the legislative discretion. *L. & N. R. R.* v. *Baldwin*, 85 Alabama, 619.

The purpose of the law is, not to reimburse the insured, but to punish the insurer for violating the law against combinations and there can be no reason for distinguish-

ing between contracts of insurance made before, and those made after, the entering into the prohibited combination.

The punishment is not so severe and far-reaching as to be classed as unreasonable and arbitrary. To so hold, the court must decide that the punishment goes so far beyond what is necessary as to shock the conscience, and there is nothing in the character, nature or extent of the punishment imposed by the statute which can authorize this court to set aside and hold for naught the legislative will and judgment expressed in and by the enactment of the said statute.

The well-established rule that contracts of insurance are to be construed most strictly against the insurer, is here applicable and relevant.

MR. JUSTICE HARLAN delivered the opinion of the court.

This action was brought in one of the courts of Alabama by the defendant in error, Hale, on a policy of fire insurance issued by the German Alliance Insurance Company, a New York corporation.

The policy covered "lumber and square timber while stacked on the banks of Byrne's Mill Pond near Bay Minette, Baldwin County, Alabama, said lot of lumber and timber containing 300,000 feet," etc.

Upon the petition of the defendant, the case was removed into the Circuit Court of the United States for the Southern District of Alabama, where a verdict was returned for $5,198.93 in favor of the plaintiff. For that amount judgment was rendered against the company. The Circuit Court suggested that the verdict was excessive, and that the motion for new trial would be granted, unless the plaintiff reduced the verdict to $4,112. The required reduction was made and the new trial denied. *Northern Pacific R. R. Co.* v. *Herbert*, 116 U. S. 642, 647.

The principal question presented by the assignments of

error arises out of certain provisions of the Code of Alabama, as follows:

"SECTION 2619. Every contract or policy of insurance hereafter made or issued shall be construed to mean that in the event of loss or damage thereunder, the assured or beneficiary thereunder may, in addition to the actual loss or damage suffered, recover twenty-five per cent of the amount of such actual loss, any provision or stipulation in such contract or policy to the contrary notwithstanding. Provided, at the time of the making of such contract or policy of insurance, or subsequently before the time of trial, the insurer belonged to, or was a member of, or in any way connected with, any tariff association or such like thing by whatever name called, or who had made any agreement or had any understanding with any other person, corporation or association engaged in the business of insurance as agent or otherwise about any particular rate of premium which should be charged or fixed for any kind or class of insurance risk; and, provided further, no stipulation or agreement in such contract or policy of insurance to arbitrate loss or damage nor to give notice or make proofs of loss or damage shall in any such case be binding on the assured or beneficiary, but right of action accrues immediately upon loss or damage.

"SECTION 2620. If it is shown to the reasonable satisfaction of the jury by a preponderance of the weight of the testimony that such insurer at the time of the making of such agreement or policy of insurance or subsequently before the time of trial belonged to, or was a member of, or in any way connected with any tariff association or such like thing by whatever name called, either in or out of this State, or had made any agreement or had any understanding either in or out of this State with any other person, corporation or association engaged in the business of insurance as agent or otherwise about any particular rate of premium which should be charged or fixed for any risk of

insurance on any person or property or on any kind or class of insurance risk, they must, if they find for the assured or beneficiary, in addition to his actual damages, assess and add twenty-five per cent of the amount of such actual loss, and judgment shall be rendered accordingly, whether claimed in the complaint or not." Alabama Code, 1896, §§ 2619, 2620; *Ib.*, 1907, §§ 4954, 4955.

At the time of the contract of insurance the defendant corporation was connected with a tariff association which prescribed the rates of premium to be charged by its constituent members. The verdict and judgment against the company gave effect to that clause of the statute providing that under every contract or policy of insurance, thereafter made or issued by any such association, the assured or beneficiary may, in addition to the actual loss or damage suffered, recover 25 per cent of the amount of such actual loss, any provision or stipulation in such contract or policy to the contrary notwithstanding.

The assignments of error present a question of practice which is supposed to be raised by those provisions of the policy which contained a covenant and warranty in these words:

"1st. The assured will take a complete itemized inventory of stock on hand at least once in each calendar year, and unless such inventory has been taken within twelve calendar months prior to the date of this policy, one shall be taken in detail within thirty days of issuance of this policy, or this policy shall be null and void from such date, and upon demand of the assured the unearned premium from such date shall be returned. 2d. The assured will keep a set of books, which shall clearly and plainly present a complete record of business transacted, including all purchases, sales and shipments, both for cash and credit, from date of inventory, as provided for in the first section of this clause and during the continuance of this policy. 3d. The assured will keep such books and inventory, and

also the last preceding inventory, if such has been taken, securely locked in a fireproof safe at night. In the event of failure to produce such set of books and inventories for the inspection of this company, this policy shall become null and void, and such failure shall constitute a perpetual bar to any recovery thereon. And defendant avers that the assured wholly disregarded the terms, stipulations and conditions of said policy in the following respects, to wit: 1st. He did not keep a set of books as therein provided; 2d. He did not keep said books securely locked in a fireproof safe at night, and at other times as therein provided; 3d. He failed to produce said books for the inspection of the defendant after said alleged loss, wherefore said policy became and was null and void. And the defendant says by reason of the failure and refusal of said plaintiff to comply with the said covenant and warranty in the said particulars the said plaintiff is not entitled to recover in this action, nor to have and maintain this action against the defendant."

The principal question arising on this writ of error is whether the above sections of the Alabama Code are consistent with the Constitution of the United States. The contention is that the provision allowing the insured or beneficiary in a named contingency to recover, in addition to the actual loss or damage suffered by him, twenty-five per cent of the amount of loss or damage so suffered—any stipulation in the contract of insurance to the contrary notwithstanding—deprives the company of its property without due process of law, and also denies to it the equal protection of the laws; thus, it is contended, violating the Fourteenth Amendment of the Constitution of the United States.

In our opinion the statute is not liable to objection on constitutional grounds. The State—as we may infer from the words of the statute alone—regarded the fixing of insurance rates by self-constituted tariff associations or com-

binations as an evil against which the public should be guarded by such legislation as the State was competent to enact. This question was before the Supreme Court of Alabama, and the statute was there assailed as violating both the state and Federal constitutions. That court held that the object of the legislature of Alabama was to prevent monopoly and to encourage competition in the matter of insurance rates, and that the statute was a legitimate exercise to that end of the police power of the State, not inconsistent with either the state or Federal constitution. *Continental Ins. Co.* v. *Parkes*, 142 Alabama, 650, 658, 659. The same view of the statute was taken by the state court in subsequent cases. *Firemen's Fund Ins. Co.* v. *Hellner*, 49 So. Rep. 297; *Ætna Ins. Co.* v. *Kennedy*, 50 So. Rep. 73. We concur entirely in the opinion expressed by the state court that the statute does not infringe the Federal Constitution, nor deprive the insurance company of any right granted or secured by that instrument. The business of fire insurance is, as every one knows, of an extensive and peculiar character, and its management concerns a very large number of people, particularly those who own property and desire to protect themselves by insurance. We can well understand that fire insurance companies, acting together, may have owners of property practically at their mercy in the matter of rates, and may have it in their power to deprive the public generally of the advantages flowing from competition between rival organizations engaged in the business of fire insurance. In order to meet the evils of such combinations or associations, the State is competent to adopt appropriate regulations that will tend to substitute competition in the place of combination or monopoly. *Carroll* v. *Greenwich Ins. Co.*, 199 U. S. 401, 411. Regulations, having a real, substantial relation to that end, and which are not essentially arbitrary, cannot properly be characterized as a deprivation of property without due process of law. They are enacted

under the power with which the States have never parted, of caring for the common good within the limits of constitutional authority. Insurance companies, indeed, all corporations, associations and individuals, within the jurisdiction of a State, are subject to such regulations, in respect of their relative rights and duties, as the State may, in the exercise of its police power and in harmony with its own and the Federal Constitution, prescribe for the public convenience and the general good. *Jacobson* v. *Massachusetts*, 197 U. S. 11, 27, 31; *Lake Shore &c.* v. *Ohio*, 173 U. S. 285, 297; *House* v. *Mayes*, *ante*, p. 270.

Much stress is placed by the insurance company on that clause of the statute allowing the insured to recover, in addition to the actual loss or damage suffered, twenty-five per cent of the amount of such loss or damage, if the company, before or at the time of trial belonged to or was connected with a tariff association that fixed rates. We do not think that this provision is in excess of the power of the State. As a means to effect the object of the statute—the discouragement of monopoly or combination and the encouragement of competition in the matter of insurance rates—the State adopted the regulations here in question. It was for the State, keeping within the limits of its constitutional powers, to say what particular means it would prescribe for the protection of the public in such matters. The court certainly cannot say that the means here adopted are not, in any real or substantial sense, germane to the end sought to be attained by the statute. Those means may not be the best that could have been devised, but the court cannot, for any such reason, declare them illegal or beyond the power of the State to establish. So far as the Federal Constitution is concerned, the State could forbid, under penalty, combinations to be formed within its limits, by persons, associations or corporations engaged in the business of insurance, for the purpose of fixing rates. But it is not bound to go to that extent in its

legislation. It may, in its discretion, go only so far as to impose upon associations or corporations acting together in fixing rates, a liability to pay to the insured, as part of the recovery, a certain per cent beyond the actual loss or damage suffered, if, before or at the time of suit on the contract of insurance, it is made to appear that the company or corporation sued is part of or connected with a tariff rate association. Such a provision manifestly tends to discourage monopoly or combination and to encourage competition in a business in the conduct of which the general public is largely interested.

Equally without basis on which to rest is the contention that the statute violates the clause of the Fourteenth Amendment, forbidding a State to "deny to any person within its jurisdiction the equal protection of the laws." We will assume, for the purposes of this case, that this company is within the jurisdiction of the Federal court so as to entitle it to claim the benefit of that provision of the Fourteenth Amendment. *Blake* v. *McClung*, 172 U. S. 239, 260. We are yet clearly of the opinion that the statute does not, within the meaning of the Constitution, deny the insurance company the equal protection of the laws. The statute applies only to associations or corporations that unite in fixing the rates of insurance to be charged by each constituent member of the combination. Looking at the evil to be remedied, that was such a classification as the State could legally make. It is neither unreasonable nor arbitrary within the rule that a classification must rest upon some difference indicating "a reasonable and just relation to the act in respect of which the classification is proposed." The legislature naturally directed its enactment against insurance companies or corporations which before or at the time of trial were found to be members of an insurance tariff association that fixed rates. No principle of classification required it to include insurance associations that were free to act, in

the matter of rates, upon the merits of each application for insurance, unaffected by any agreement or arrangement with other companies. All insurance companies, persons, or corporations engaged in the business of insurance as agent or otherwise with associations, persons or corporations which acted together in fixing rates are placed by the statute upon an equality in every respect, and, therefore, it cannot rightfully be contended that the plaintiff in error is denied the equal protection of the laws. Whatever "liberty of contract" they had must have been exercised in subordination to any valid regulations the State prescribed for the conduct of their business. Statutes that apply equally to all of the same class and under like conditions cannot he held to deny the equal protection of the laws; for, as this court has adjudged, "the equal protection of the laws is a pledge of the protection of equal laws" to all under like circumstances. *Yick Wo* v. *Hopkins*, 118 U. S. 356, 367; *Barbier* v. *Connolly*, 113 U. S. 27; *Soon Hing* v. *Crowley*, 113 U. S. 703.

One of the assignments of error for this court, the ninth, is that the Circuit Court erred in sustaining the plaintiff's demurrer to the plea numbered two, in which reference was made to the above provisions, alleged to be embodied in the policy and which make it the duty of the assured at stated times to take an inventory of stock on hand and keep a set of books to be securely locked in a fireproof safe at night. To that plea the plaintiff demurred upon these separate grounds: 1. It did not appear that the plaintiff was bound by the provision of the policy referred to in the plea. 2. The property insured was of such a character that the policy set up in the plea was not applicable thereto. 3. It did not appear that the property insured was of such a character that the provision of the policy, as set up in the plea, was applicable thereto. 4. It was not made to appear by the plea that there was any purchase, sales and shipment or other business transacted from the time the

policy was issued until the time of the loss which affected or related to the property insured. The demurrer was sustained, but no exception appears to have been taken to this action of the court. The defendant did not stand upon his plea, and went to trial upon the merits of the case, without objection, and introduced evidence upon other issues in the case, but at the trial no evidence was offered or introduced on either side relating to the matters set out in the second plea. Under these circumstances, we are not required to consider the questions raised by that plea. On this record we may fairly assume that the defendant, at the trial, waived or abandoned the issues raised by the plea. *Garrard* v. *Lessee of Reynolds*, 4 How. 123, 126; *Weed* v. *Crane*, 154 U. S. 570. Restricting this decision to the points herein before discussed the judgment must be affirmed.

Judgment affirmed.